Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

R.H., by his parents and next friends
Emily and Matthew H.,
Petitioner,

v.

Plano Independent School District,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Stacy L. Zoern*
Kurt M. Sauer
Daffer McDaniel LLP
700 Lavaca Ste. 720
Austin, Texas 78701
(512) 476-1400

* *Counsel of Record* *Attorneys for Petitioner*

QUESTIONS PRESENTED

The Fifth Circuit held that federal mainstreaming requirements of the Individuals with Disabilities Education Act do not have to be applied to preschoolers in certain circumstances. Since the Third, Seventh, and Tenth Circuits do apply these mainstreaming requirements to preschoolers in these same circumstances, preschoolers with disabilities are no longer equally protected by the law.

Three questions are presented:

1. Under 20 U.S.C. § 1412(a)(5)(A), must a mainstreaming analysis be applied to determine whether a preschooler with a disability can achieve a satisfactory education in the regular class even when there are no regular public preschool classes offered?

2. Under 20 U.S.C. § 1412(a)(5)(A), if a preschool child with a disability can receive a satisfactory education in a regular class, must a school district investigate the mainstream options it has available before placing a child in a more restrictive class?

3. Under 20 U.S.C. § 1412(a)(5)(A), does the statutory preference for public school over private school override a preschool child's substantive right to be educated in his least restrictive environment?

LIST OF PARTIES

The parties in this case are R.H., by his parents and next friends Emily and Matthew H., and Plano Independent School District.

CORPORATE DISCLOSURE STATEMENT

R.H. is an individual.

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June 25, 2010 Denial of the Petition for Panel Rehearing by the Court of Appeals for the Fifth Circuit

OPINION BELOW

The Eastern District of Texas affirmed the May 30, 2006 opinion of the hearing officer of the administrative due process hearing. The Fifth Circuit affirmed the March 31, 2008 decision of the United States District Court for the Eastern District of Texas, Not Reported in F.Supp.2d, 2008 WL 906289 (E.D.Tex. 2008) (including the Report and Recommendation of the Magistrate Judge). The opinion of the United States Court of Appeals for the Fifth Circuit is reported at *R.H. v. Plano Independent School District*, 607 F.3d 1003 (5th Cir. 2010). *See* Appendices A-C in Volume II.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The Fifth Circuit's opinion was rendered on May 27, 2010. Despite several substantive errors of fact and law, the Petition for Panel Rehearing filed on June 10, 2010 was denied on June 25, 2010. *See* Appendix D and E in Volume II.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 20 United States Code § 1400(c)(5)(C).

Findings.

(5) Almost 30 years of research and experience has

demonstrated that the education of children with disabilities can be made more effective by--

(C) coordinating this chapter with other local, educational service agency, State, and Federal school improvement efforts, including improvement efforts under the Elementary and Secondary Education Act of 1965 [20 U.S.C.A. § 6301 et seq.], in order to ensure that such children benefit from such efforts and that special education can become a service for such children rather than a place where such children are sent.

Title 20 United States Code § 1412(a)(1)(A).

Free appropriate public education.

A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school.

Title 20 United States Code § 1412(a)(5)(A).

Least restrictive environment ("LRE").

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the

disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

Title 20 United States Code § 1412(a)(10)(B)(i).

Children placed in, or referred to, private schools by public agencies.

In general Children with disabilities in private schools and facilities are provided special education and related services, in accordance with an individualized education program, at no cost to their parents, if such children are placed in, or referred to, such schools or facilities by the State or appropriate local educational agency as the means of carrying out the requirements of this subchapter or any other applicable law requiring the provision of special education and related services to all children with disabilities within such State.

Title 34 Code Federal Regulations § 300.114 (a)(1), (2).

LRE requirement.

(a) General. (1) Except as provided in §300.324(d)(2) (regarding children with disabilities in adult prisons), the State must have in effect policies and procedures to ensure that public agencies in the State meet the LRE requirements of this section and §§300.115 through 300.120.

(2) Each public agency must ensure that—

(i) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and

(ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

Title 34 Code Federal Regulations § 300.115(a), (b).

Continuum of Alternative Placements.

(a) Each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.

(b) The continuum required in paragraph (a) of this section must—

(1) Include the alternative placements listed in the definition of special education under §300.38 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions); and

(2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement

Title 34 Code Federal Regulations § 300.116(a).

Placements.

In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that--

(a) The placement decision--

(1) Is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and

(2) Is made in conformity with the LRE provisions of this subpart, including §§ 300.114 through 300.118;

Title 34 Code Federal Regulations § 300.118.

Children in public or private institutions.

Except as provided in §300.149(d) (regarding agency responsibility for general supervision of some individuals in adult prisons), an SEA must ensure that §300.114 is effectively implemented, including, if necessary, making arrangements with public and private institutions (such as a memorandum of agreement or special implementation procedures).

Title 34 Code Federal Regulations § 300.325(c).

Private school placements by public agencies.

Responsibility. Even if a private school or facility implements a child's IEP, responsibility for compliance with this part remains with the public agency and the SEA.

STATEMENT OF THE CASE

1. This case involves the Individual with Disabilities Education Act's ("IDEA") requirement that children with disabilities, including preschoolers, are educated with nondisabled children to the maximum extent appropriate. 20 U.S.C. § 1412(a)(1)(A); 20 U.S.C. § 1412(a)(5)(A) (this is also referred to as the IDEA's mainstreaming requirement). In other words, a child must be educated in his least restrictive environment (the extent to which mainstreaming is appropriate for him). *Id.* The IDEA clarifies how to determine to what extent mainstreaming is "appropriate," stating that removal from the regular class should occur only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. *Id.* To this end, states are required to make available a "continuum of alternative placements" which must include "regular classes." 34 C.F.R. § 300.115.

The circuit courts have developed varying yet similar analyses to ensure the mainstreaming requirement of the IDEA is complied with (listed below). These analyses generally consider the accommodations the school district attempted to provide in the regular class, the academic benefit the child can receive from a regular class, the nonacademic benefit the child can receive from a regular class, and whether the child is disruptive to the other students in a regular class. Most circuits also consider in varying degree the cost of educating the child in a regular class, though some circuits do not enumerate this as a mainstreaming factor. While these analyses are used by other circuits to determine whether all children protected by the IDEA ages 3-21 have been mainstreamed in accordance with the law, the Fifth Circuit contends that such an analysis is not appropriate for a certain subset of children: preschoolers living in school districts that do not offer regular public preschool classes.

2. As evidenced by the Individual Education Plan ("IEP") documents in this case, respondent Plano Independent School District ("PISD") offered only one placement for R.H.: a full-time special education placement at a Preschool Program for Children with Disabilities ("PPCD"). The record reveals that PISD is intent on placing preschool children with disabilities in its PPCD classes, whether or not this constitutes the least restrictive environment for a particular child. PISD will not utilize private preschools, claiming it has no control to implement an IEP in a private setting, and it does not discuss with parents or offer any other regular class options for preschoolers available within the district, such as its Early Learning Centers, Head Start, or regular

kindergarten classes. R.H.'s due process complaint alleged he had not been educated in the least restrictive environment.

3. The due process hearing officer blessed R.H.'s placement in a full-time special education class at the PPCD without first making a determination as to whether education for R.H. could be achieved satisfactorily in regular classes with supplemental aids and services. This was a violation of the IDEA's mainstreaming requirement.

The hearing officer's conclusion that "there are no regular classrooms" for preschoolers has proved to be problematic because the Fifth Circuit uses the lack of regular public preschools as a basis for avoiding the application of the IDEA's mainstreaming requirement.[1] While school districts should be given deference with respect to which regular class alternatives are the most feasible and cost-effective to utilize, the fact that there are no public "regular classrooms" in a school district should not give school districts the green light to segregate impressionable young children with disabilities into full-time special education classes.

4. R.H. appealed the hearing officer's decision to the District Court, arguing that a mainstreaming analysis (such as the factors set forth in the Fifth Circuit's *Daniel R.R.*, 874 F.2d at 1044) is necessary

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[1] While there are no free, district operated regular preschools (the compulsory school age is six), there are tuition based district operated regular preschool classes, private regular preschool classes, kindergarten regular classes which can be used for preschoolers for LRE purposes, and Head Start preschool classes.

to guarantee his right to be educated in a regular class if appropriate and it was thus fundamental error to ignore uncontroverted evidence which showed a) the school district took no steps to accommodate R.H. in a regular class before assuming he needed a special education class; b) R.H. obtained educational benefit in the regular education classroom; c) R.H. obtained non-academic benefit in the regular education classroom; d) R.H.'s presence in the regular education classroom did not detrimentally affect the other students in the classroom; and e) there were regular preschool class options close to R.H.'s residence.

5. Logically, it is not possible under the IDEA to determine that a special education class is a child's least restrictive environment without ever asking whether he can receive a satisfactory education in a regular class. However, without ever applying the necessary mainstreaming analysis, the District Court held that R.H.'s full-time special education class mainstreamed him to the maximum extent appropriate and thus was his least restrictive environment.

6. R.H. appealed the District Court decision to the Court of Appeals for the Fifth Circuit. Again without applying a necessary mainstreaming analysis, the Fifth Circuit affirmed the school district's placement of R.H. into a full-time special education class. The IDEA clearly states that a child can be removed from a regular class under only one condition: when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 20 U.S.C. §

1412(a)(5)(A). The Fifth Circuit creates an exception to this statutory requirement and allows the removal of preschoolers from the regular class even in the absence of this condition being met. The Fifth Circuit permits removal from the regular class based only on the lack of a regular public preschool in the school district and justifies its perceived lack of options by disfavoring private preschool placements,[2] and failing to explore alternative regular class options.

7. The Fifth Circuit's holding that the IDEA's mainstreaming requirement does not apply to preschoolers in school districts which do not operate regular public preschools creates a conflict with the statutory language of the IDEA and holdings of the Third, Seventh, and Tenth Circuits.

8. This case arose from an appeal of a due process hearing pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. § 1415(i)(2)(A). Thus, the District Court had jurisdiction of the federal claims in the action under 28 U.S.C. § 1331. The Court of Appeals for the Fifth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291.

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[2] Private school placements are expressly permitted by federal law for fulfilling the least restrictive environment requirements for preschoolers. 20 U.S.C. § 1412(a)(10)(B)(i); 34 C.F.R. §§ 300.118; 300.325(c).

REASONS FOR ALLOWANCE OF THE WRIT

Whether a preschool child with a disability can be placed in a more restrictive setting than necessary under 20 U.S.C. § 1412(a)(5)(A) is an important question on which the circuit courts are split, and on which this Court's guidance is urgently needed. The preschool years present unique challenges and require creative solutions since very few school districts in the United States provide free public preschools. The preschool years are crucial for children with disabilities, and especially for children like R.H. who are high functioning with autism. While the numbers of newly diagnosed infants and toddlers with autism continue to soar, experts warn that early intervention in the areas of self-help, communication, and social skills are crucial. With appropriate role models and intensive early intervention, many of these children can be dismissed from special education programs at an early age to ultimately live independent, self-sufficient lives. However, if segregated at an early age in classes with primarily children not able to serve as role models for these skills and unable to provide appropriate feedback for communication and socialization, the education and sustenance of children with autism can become costly for taxpayers. Such segregation often results in the high costs associated with providing special education until the child is 21 years old, which leads to even greater government assistance as an adult. Moreover, the failure to recognize a child's substantive right under the IDEA to be educated with nondisabled peers to the maximum extent appropriate regresses decades of progress achieved by American jurisprudence.

Four Circuit Courts of Appeal, including the Fifth Circuit in this case, have considered the least restrictive environment obligations school districts have for preschool children with disabilities. Specifically, the Fifth Circuit upheld a special education preschool class as the least restrictive environment without ever determining whether the preschooler could benefit from a regular class. The Third, Seventh, and Tenth Circuits on the other hand, upheld preschools designed for nondisabled children as the least restrictive environment when the preschooler can benefit from a regular class. The Third, Seventh, and Tenth Circuits are appropriately applying IDEA's mandate to provide a regular class and only remove the child to a more restrictive special education class if the severity of the child's disability requires the removal. The Fifth Circuit is missing this mainstreaming intention of the IDEA by only evaluating the options offered by the school district without first determining the child's ability to be mainstreamed.

The split among the Circuits that have ruled on the least restrictive environment issue at the preschool level requires resolution. Parents of preschool children remain uncertain about the rights of their children and whether to incur the expense of enforcing these uncertain rights. Specifically, in some circuits, the courts have held that if a preschooler can be mainstreamed, then a special education class in a hybrid preschool is not appropriate, and the child has a right to be educated in a regular preschool class. The Fifth Circuit, on the other hand, has held that a special education class in a hybrid preschool is mainstream enough regardless of the child's abilities.

School districts are similarly in limbo with respect to how to legally provide a free appropriate public education ("FAPE") in the least restrictive environment to preschool children with disabilities. The needs of children with autism and the least restrictive environment requirement of the IDEA are two of the most commonly litigated areas of special education, and the preschool years present the greatest legal uncertainties. The resources presently expended on litigating the uncertainties regarding these issues would be far better spent on education. In addition, the ramifications of the Fifth Circuit's decision are significant. Left undisturbed, this decision will result in the failure to provide access to regular classes for preschool children with disabilities throughout the Circuit, and in the other circuits that have adopted the Fifth Circuit's mainstreaming analysis.

I. REVIEW IS NECESSARY TO RESOLVE A CONFLICT CONCERNING WHETHER A MAINSTREAMING ANALYSIS IS REQUIRED

A. Avoiding A Mainstreaming Analysis Conflicts With The Mainstreaming Intent Of The IDEA

The IDEA specifically mandates the placement of children with disabilities in regular education classrooms whenever possible. *Board of Educ. v. Rowley*, 458 U.S. 176, 207 (1982); *The Individuals with Disabilities Education Act Amendments of 1997*, 105th Cong. 105-95 (1997) (statement of George Miller) ("The intent behind [the 1997 Amendments to the IDEA] was to strengthen the least restrictive environment requirement and participation of children with disabilities in the general curriculum and the regular education classroom."). Section 1412 requires that "to the maximum extent appropriate, children with disabilities are educated with children who are not disabled," and that the "removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of the child is such that education in regular classes with the use of supplemental aids and services cannot be achieved satisfactorily." 20 U.S.C § 1412 (a)(5)(A).

The placement of "a child in a school for disabled children runs counter to the policy of the IDEA of 'mainstreaming' disabled children to the 'maximum extent appropriate.'" *Casey K. ex rel. Norman K. v. St. Anne Community High Sch. Dist. No. 302*, 400 F.3d 508, 512 (7th Cir. 2005). Accordingly, school districts

should be required to show that the full range of supplementary aids and services was not only considered, but that accommodating steps were made prior to recommending placement in a more restrictive classroom. School districts should also be required to show that adequate consideration was given to both the academic and nonacademic benefits a child with disabilities will receive from a mainstreamed education.

To this end, several standards have been adopted to determine when a school district may remove a child from a regular educational classroom without violating Congress' mandate for inclusion. *Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1215 (3d Cir.1993); *Devries v. Fairfax County Sch. Bd.*, 882 F.2d 876, 878 (4th Cir. 1989); *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1044 (5th Cir. 1989); *Roncker v. Walter*, 700 F.2d 1058 (6th Cir. 1983); *Sch. Dist. of Wis. Dells v. Littlegeorge*, 295 F.3d 671, 672 (7th Cir.2002); *A.W. v. N.W. R-1 Sch. Dist.*, 813 F.2d 158, 163 (8th Cir.1987); *Sacramento v. Rachel H. by Holland*, 14 F.3d 1398 (9th Cir. 1994); *L.B. v. Nebo School District*, 379 F.3d 966, 977 (10th Cir. 2004); *Greer v. Rome City Sch. Dist.*, 950 F.2d 688 (11th Cir. 1991). These standards are commonly referred to as the *Roncker*, *Daniel R.R.* and *Holland* tests.

The *Daniel R.R.* test was specifically designed by the Fifth Circuit in response to litigation concerning a preschool child with a disability. It has also been adopted by the Third Circuit in *Oberti*, 995 F.2d 1204 and the Tenth Circuit in *Nebo*, 379 F.3d 966. Importantly, the Fifth Circuit in *Daniel R.R.* recognized that:

> the decision whether to mainstream a child must include an inquiry into whether the student will gain any educational benefit from regular education. Our analysis cannot stop here, however, for educational benefits are not mainstreaming's only virtue. Rather, mainstreaming may have benefits in and of itself. For example, the language and behavior models available from nonhandicapped children may be essential or helpful to the handicapped child's development. In other words, although a handicapped child may not be able to absorb all of the regular education curriculum, he may benefit from nonacademic experiences in the regular education environment.

Daniel R.R., 874 F.2d at 1047-58. A refusal to apply this analysis at the preschool level when there is no regular public preschool option derails this protection for the most vulnerable of those individuals for which the IDEA is intended to protect. It makes the *Daniel R.R.* test, developed with respect to the education of a preschooler with a disability, inapplicable to a vast majority of preschoolers in the Fifth Circuit, depending on whether the particular school district funds public preschools. The Third and Tenth Circuits, which have adopted the *Daniel R.R.* test, may similarly withhold the protections this analysis offers from preschoolers with disabilities in school districts that do not fund public preschools. A child's federal right to be mainstreamed to the

maximum extent appropriate should not be dependent on the school district in which the child resides.

B. The Fifth Circuit Creates A Conflict With Other Circuits In Holding That A Mainstreaming Analysis Is Not Necessary When There Is No Regular Public Class

The facts of the Third Circuit's *Kingwood* case, in which Justice Alito wrote the opinion, are strikingly similar to the facts of the present case. *T.R. v. Kingwood Township Bd. of Educ.*, 205 F.3d 572, 577-580 (3d Cir. 2000). In both cases, there was no "regular" public preschool. In both cases, the school district offered a hybrid preschool class: a class designed for children with disabilities that integrated typically developing children. Finally, in both cases, the parents utilized a private preschool to provide the least restrictive environment for their child.

In finding that it is clear under the terms of the IDEA that the hybrid preschool class is more restrictive than a regular fully mainstreamed class, the Third Circuit found such a setting would ordinarily be the least restrictive environment under only two circumstances: 1) if the child cannot receive a satisfactory education in a regular class with supplemental aids and services, or 2) where a regular classroom is not available within a reasonable commuting distance of the child. Importantly, the Third Circuit did not define "regular" as the hearing officer did in the present case to mean a public preschool because the record in that case had already revealed there wasn't one. Rather, the case was

remanded to investigate potential alternative regular classroom placements.

Given the Third Circuit's recognition that a hybrid preschool class may be the least restrictive environment if the child can not receive a satisfactory education in a regular class, it is implicit that such a determination must be made, even as in that case, where there is no regular public preschool option. The Fifth Circuit's refusal to make the determination of whether R.H. could receive a satisfactory education in a regular class (by applying the *Daniel R.R.* test), and placing him directly in the more restrictive special education class without investigating whether regular class options were available, conflicts with the Third Circuit.

Similarly, these facts repeat with the Tenth Circuit case *Nebo*, 379 F.3d 966. There was no regular public preschool, the school district recommended a placement in a hybrid preschool class, and the parents placed their child in a regular private preschool. Here again, despite the lack of a regular public preschool, the Court applied the Fifth Circuit's *Daniel R.R.* test. This analysis revealed that even though some of the child's needs could be met at the hybrid preschool, the hybrid preschool was not the child's least restrictive environment and the school district had accordingly violated the IDEA.

However, despite the application of the Fifth Circuit's *Daniel R.R.* test in *Nebo* where there was no regular public preschool, the Fifth Circuit has held that this very analysis does not speak to a case where there is no regular public preschool. Appendix at 80a.

In the present case, the Fifth Circuit never asked whether R.H. can benefit from a more inclusive setting. The Fifth Circuit assumed, along with the school district, that an IEP can't be implemented in a private setting, but this did nothing to reveal whether R.H. can be mainstreamed, especially since there were other regular class options available.

The Fifth Circuit opinion in the present case directly conflicts with the Third and Tenth Circuits by holding that a mainstreaming analysis is not applicable in the case of a preschooler in a school district with no regular public preschool. The Fifth Circuit eliminates the least restrictive environment protection of the IDEA for preschoolers. Without a mainstreaming analysis, and thus a way to determine a child's least restrictive environment, this protection is lost and preschoolers can be segregated with no explanation.

II. REVIEW IS NECESSARY TO RESOLVE A CONFLICT CONCERNING WHETHER A SCHOOL DISTRICT MUST INQUIRE INTO AVAILABLE REGULAR CLASSROOM OPTIONS WHEN APPROPRIATE

As noted above, in *Kingwood*, the Seventh Circuit stated that a hybrid preschool class may be the least restrictive environment even if a child can be mainstreamed if there is no regular classroom available within a reasonable commuting distance of the child. 205 F.3d at 579. Accordingly, the case was remanded to make an inquiry into whether there were regular classroom options available. *Id.* at 581.

In the present case, R.H. argued to the Fifth Circuit in briefing and during oral argument that there existed several regular classroom options, even though there was no regular public preschool. For instance, PISD operates several "Early Learning Centers," which are tuition based regular preschool classes within the local high schools, one of which is located closer to R.H.'s home than the specialized early childhood campus to which PISD restricted him. In addition, PISD has the option of utilizing its regular kindergarten classes to place preschoolers with disabilities. At the age of four, R.H. was reading to his classmates in his private preschool and had an IQ of 127, so being placed with kindergarten students would have been a feasible option to provide him a regular class. Head Start, which is frequently used by school districts to provide a regular class, would have been another option. Finally, R.H.'s private preschool provided a regular class.

However, the Fifth Circuit permitted PISD's assumption that it would not be able to implement an IEP in a private setting claiming it would have no control, despite a public school's obligation under IDEA to oversee the implementation of IEPs when districts place children in private settings. 34 C.F.R. § 300.146; 34 C.F.R. § 300.325(c). In addition, unlike the Seventh Circuit, the Fifth Circuit did not require the school district to explore the other regular class options. Instead, it concluded that since there were no regular public preschools, a more restrictive preschool class was acceptable. Had R.H. resided in the Seventh Circuit, the school district would have been required to explore the numerous options to provide him with a regular preschool class, and his substantive right to be educated with nondisabled

peers to the maximum extent appropriate would have been protected.

III. REVIEW IS NECESSARY TO RESOLVE A CONFLICT CONCERNING WHETHER THE STATUTORY PREFERENCE FOR PUBLIC OVER PRIVATE PLACEMENTS OVERRIDES A CHILD'S RIGHT TO LRE

A. Giving Deference to Public Placements At The Preschool Level Conflicts With The Mainstreaming Requirement Of The IDEA

The Fifth Circuit correctly recognizes that the IDEA "was designed primarily to bring disabled students into the public educational system and to ensure them a free appropriate public education." Appendix at 79a. However, the Fifth Circuit fails to recognize the mainstreaming purpose implicit in this intention. As the Supreme Court has recognized, the Act expressed Congress' concern about "the apparently widespread practice of relegating handicapped children to private institutions or warehousing them in special classes." *School Comm. Of the Town of Burlington v. Department of Educ.*, 471 U.S. 359, 373 (1985). Thus, when the "private" class represents a less restrictive environment and is a regular class of nondisabled peers, the private placement satisfies the substantive intention of the IDEA to end unnecessary segregation. The Fifth Circuit wrongly concludes that the "public" aspect of IDEA supersedes a child's right to be educated with nondisabled peers to the maximum extent appropriate.

For a child who can be mainstreamed, the public K-12 general education classes are usually also the least restrictive environment. However, with pre-K where there is no regular public preschool class, the least restrictive environment may be a private preschool. The Fifth Circuit failed to understand this important distinction with respect to preschool when it stated that "[t]he IDEA [] makes removal to a private school placement the exception, not the default." Appendix at 79a. While this is true, a preschool child in a district with no regular public preschool should be an exception, and the Fifth Circuit's expressed preference for the public environment, whether or not it represents the least restrictive environment, is contrary to the IDEA. The objective of the IDEA is not to have all children with disabilities in public school, it is to achieve the outcome of appropriate education, including further education, employment and independent living in the community.

Thus, at the preschool level, the "public" in FAPE often means publicly funded, and not necessarily operated by the public school district. States and appropriate local education agencies are permitted, under the law, to place children with disabilities in private schools and facilities while providing them with special education and related services in accordance with their IEP, at no cost to their parents, as a means of carrying out the FAPE and LRE requirements. 20 U.S.C. § 1412(a)(10)(B)(i). In fact, 34 C.F.R. § 300.118 specifically states that LRE must be "effectively implemented, including, if necessary, making arrangements with public and private institutions...." The Office of Special Education Programs, which administers the IDEA, expressly

provides that local education agencies that do not operate preschool programs for nondisabled preschool children may use some alternative methods for meeting the LRE requirements including placing children with disabilities in private school programs for nondisabled preschool children.

B. The Fifth Circuit Creates a Conflict With Other Circuits In Its Refusal to Utilize Private Preschool Placements

In the present case, PISD offered only its publicly operated special education class in a Preschool Program for Children with Disabilities. The Fifth Circuit accepted PISD's unsupported contention that R.H.'s IEP could not be implemented in a private setting, even though the parents were doing precisely that – at their own expense. The Fifth Circuit upheld a placement for R.H. in a public class which was more restrictive than his mainstream private class. This is contrary to the Third, Seventh, and Tenth Circuits, which have all found private preschool placements appropriate to provide a least restrictive environment for preschoolers with disabilities.

In *Kingwood*, the Third Circuit acknowledged that New Jersey state law barred the School Board from considering the particular unaccredited private preschool on its continuum of alternative placements while recognizing that if the particular private school at issue was not barred by state law due to lack of accreditation, the Board would have been required to approve the private preschool placement as the one providing a FAPE in the least restrictive environment. 205 F.3d at 580-582.

In *LaGrange*, there was no evidence that the child could not benefit from a more inclusive setting, and the Seventh Circuit held that the private regular preschool in which the parents placed their child was the least restrictive environment. *Board of Education of LaGrange School District No. 105 v. Illinois State Board of Education*, 184 F.3d 913, 916-917 (7th Cir. 1999).

In *Nebo*, the Tenth Circuit applied the Fifth Circuit's mainstreaming analysis which revealed that the child's mainstream private preschool class was the least restrictive environment – not the hybrid public preschool class offered by the school district. 379 F.3d at 978-979.

Yet in the present case the Fifth Circuit found that despite the evidence of R.H.'s success in his regular private preschool and his unique needs and abilities to be educated in a regular classroom, a more restrictive public class constituted the least restrictive environment.

The result of this failure to properly apply the mainstreaming requirement of the IDEA at the preschool level, and instead to allow courts to pick and choose students for which they will apply a mainstreaming analysis based on the public options a district makes available to one or all students, is essentially legalizing discrimination and permitting unequal protection of the laws, which results in frightening long-term implications for this vulnerable demographic and the country as a whole.

CONCLUSION

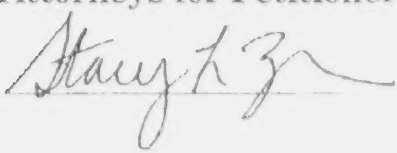
For all the foregoing reasons, petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

Stacy L. Zoern*
Kurt M. Sauer
Daffer McDaniel LLP
700 Lavaca Ste. 720
Austin, Texas 78701
(512) 476-1400

* Counsel of Record

Attorneys for Petitioners



Supreme Court, U.S.
FILED

10-436 SEP 21 2010

No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

R.H., by his parents and next friends
Emily and Matthew H.,
Petitioner,

v.

Plano Independent School District,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI VOLUME II – APPENDIX

Stacy L. Zoern*
Kurt M. Sauer
Daffer McDaniel LLP
700 Lavaca Ste. 720
Austin, Texas 78701
(512) 476-1400

* *Counsel of Record* *Attorneys for Petitioner*

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APPENDIX

APPENDIX A – AMENDED OPINION OF THE DUE PROCESS HEARING OFFICER DECIDED MAY 30, 2006

DOCKET NO. 108-SE-0106

R. H.		BEFORE A SPECIAL
b/n/f M.H. & E.H.	§	EDUCATION
Petitioner	§	
	§	
V.	§	HEARING OFFICER
	§	FOR THE
PLANO INDEPENDENT	§	
SCHOOL DISTRICT	§	
Respondent	§	ST ATE OF TEXAS
	§	

AMENDED DECISION OF HEARING OFFICER

Statement of Case

On January 25, 2006, R. H., by next friends, M. H. and E. H., ("Petitioner") filed this request for due process hearing under the Individuals with Disabilities Education Improvement Act ("IDEA 04"), 20 U.S.C. § 1400 *et seq.*, against the Plano Independent School District ("Respondent" or "District") and alleged that Respondent failed to provide Petitioner with a free appropriate public education ("FAPE"). Petitioner was represented by Myrna H. Silver, attorney at law. Nona C. Matthews, of the law firm, Walsh, Anderson, Brown, Schulze & Aldridge, P.c., appeared on behalf of Respondent.

After a pre-hearing conference on February 27, 2006, a Pre-Hearing Order was issued. At the request of Petitioner for certain specific changes to his claims and issues, an Amended Pre-Hearing Order was issued that incorporated those changes. The due process hearing convened on April 4, 2006, and

continued on April 6 and 7, 2006. Following the presentation of each party's case, the parties filed written closing arguments, and by their agreement, the decision due date in this matter was set for May 31, 2006 in compliance with the forty-five day rule.

Petitioner made the following claims against the District:

1. The District acted in bad faith and failed to comply with an agreement reached by the parties at a resolution session in a prior due process complaint;
2. In January, 2005, the District offered and placed Petitioner in its PPCD program at Beaty Early Childhood Center and failed to consider the full spectrum of educational programs available to Petitioner during the spring semester, 2005;
3. Although prior to Petitioner's enrollment in the District, Petitioner received occupational therapy ("OT") from Early Childhood Intervention ("ECI"), and although Petitioner's private evaluations recommended OT, the District failed to consider the provision of occupational therapy ("OT") to Petitioner and failed to provide OT to Petitioner;
4. During the 2005-2006 school year, the District failed to provide an appropriate length of school day to Petitioner;
5. The District offered an inappropriate educational program to Petitioner in that a portion of the program included no peers of Petitioner, and the District did not offer a staff person with appropriate certification, namely an occupational therapist, to address Petitioner's feeding skills;
6. The District failed to offer or provide an appropriate speech therapy ("ST") program to

Petitioner in that it offered an inadequate amount of one to one speech therapy;
7. In the spring semester, 2005, the District failed to address in-home training;
8. The District failed to consider Extended School Year ("ESY") services to Petitioner in the summer, 2005; and
9. The District failed to properly evaluate Petitioner's need for physical therapy ("PT"), failed to consider the provision of PT to Petitioner, and failed to consider or follow the recommendations of a private PT evaluation that recommended PT for Petitioner.

Based on the above claims, the following issues were adjudicated at hearing:

1. Whether or not a resolution session agreement between the parties was reached in the fall semester, 2005 and, if an agreement was made, whether or not the District failed to comply with such agreement;
2. For the spring semester, 2005, whether or not the District considered the full continuum of placement options, and whether or not the District's placement for Petitioner for the spring semester, 2005, was appropriate;
3. Whether or not the District's placement of Petitioner during the spring semester, 2005, and its proposed placement for the 2005-2006 school year was in the least restrictive environment ("LRE") and resulted in a denial of FAPE to Petitioner; and
4. Whether or not the District failed to consider or provide ESY to Petitioner during the summer, 2005.

Petitioner requested the following relief in this proceeding:

1. An order directing the District to reimburse Petitioner's parents for all tuition and fees incurred at Petitioner's current private school from the end of May, 2005 to the present, and an order directing the District to pay for tuition and fees incurred prospectively by Petitioner until Petitioner begins kindergarten in the fall semester, 2008;

2. An order directing the District to reimburse Petitioner's parents for privately conducted ST, OT, and PT evaluations in the summer, 2005;

3. An order directing the District to reimburse Petitioner's parents for expenses incurred for ST provided by Valerie Sherman from September, 2005 to the present time, and an order directing the District to pay for such ST services conducted prospectively on a year round basis, such ST being on a one-to-one basis in an amount of two, 30 minutes sessions per week, until Petitioner begins kindergarten at the District or until it is determined that Petitioner no longer needs such therapies; and

4. An order directing the District to reimburse Petitioner's parents for privately conducted ST, OT and PT by Advanced Therapy Services from May, 2005 to the present time, and an order directing the District to pay for such ST, OT, and PT services conducted prospectively on a year round basis until Petitioner begins kindergarten at the District or it is determined that Petitioner no longer needs such therapies.

Findings of Fact

1. R. H. is a four-year-old child, and resides with his parents within the geographical boundaries of the District. [Petitioner Exhibit 1 and 2]

2. Petitioner is a student eligible for special education services under the classifications of Non-

Categorical Early Childhood ("NCEC") with a suspicion of autism and speech impairment ("SI"). [Respondent's Exhibit 1]

3. Petitioner received services from the ECI Program beginning in March, 2004, having qualified for such services in the area of communication/cognition. [Petitioner's Exhibit 27]

4. Petitioner experienced separation anxiety at night and school, and awoke once or twice at night at least 50% of time before his third birthday. [Petitioner's Exhibit 27; Respondent's Exhibit 1]

5. From June to December, 2004, on a full-day basis, Petitioner attended TLC Child Development Center ("TLC"), a private pre-school for typically-developing children. He required extra attention in art and extra direction when it was time to wash his hands. He spoke single words and some two to three word phrases. His speech skills were emerging and were steadily progressing. His greatest difficulty was successful communication in a classroom setting. He had separation anxiety when he began at TLC, but by December, 2004 he was not having difficulty with separation from his mother. Petitioner was in the process of being potty trained. The TLC staff had no problems with Petitioner's behavior, but encouraged him to interact with his peers since he kept to himself. [Tr. Vol. I, Pages 1, 2, 28-30, 34; Tr. Vol. II, Pages 101-103]

6. Prior to enrollment in the District, Petitioner received ECI services on a 1: 1 basis for 2 hours, 15 minutes per week. The weekly service consisted of 90 minutes speech therapy and 45 minutes occupational therapy for sensory regulation. [Tr. Vol. I, Page 25]

7. Numerous assessments of R. H. have been performed over a one year period. Those assessments

and results appear on Table I at the end of this decision.

8. At approximately age three, Petitioner could throw, catch and kick a ball, and work puzzles. [Petitioner's Exhibit 1; Respondent's Exhibit 1]

9. At almost four years, Petitioner could catch, throw and kick a ball, and jump up and down on both feet. [Petitioner's Exhibit 18]

10. On December 10, 2004, an admission, review and dismissal ("ARD") meeting was held at which time Petitioner was identified as a student eligible for special education services under IDEA with disabilities of NCEC with a suspicion of autism spectrum disorder and S1. The committee determined that R. H. needs one-to-one instruction during transition period, small-group instruction in order to learn new information, to reinforce and practice new information, and for independent practice and generalization of skills. The committee, including Petitioner's parent, developed an individualized education program ("IEP") for Petitioner that included 60 minutes of group speech therapy. The ARD committee did not require a Behavioral Intervention Plan ("BIP"), PT or OT. Petitioner was placed in the District's early childhood program at Beaty Early Childhood School ("Beaty") which is the home campus for a child of Petitioner's age. The ARD committee discussed and considered in-home training and parent training but determined that Petitioner would be able to generalize skills across settings; thus, neither training was offered. Petitioner's parent agreed with the ARD decisions. [Petitioner's Exhibit 2; Respondent's Exhibit 2; Tr. Vol. II, Pages 143-146, 161]

11. Numerous accommodations were determined necessary for Petitioner's educational success. A sampling of his short term objectives include the following:

- Answer yes/no questions
- Increase expressive vocabulary by 15 or more words per month
- Increase length of utterance to 3-5 words
- Engage in joint attention to non-preferred activities
- Develop tolerance to changes in environment by using visual/tangible cues
- Increase on-task behavior for non-preferred activities for 3-5 minutes
- Participate in classroom tactile activities for 1-2 minutes without protest
- Expand food varieties at snack to try 2 new foods per month [Petitioner's Exhibit 2; Respondent's Exhibit 2]

12. Beaty is one of three early childhood schools in the District and has an enrollment of over 400 students; it has a state-funded pre-kindergarten program for at-risk students, pre-school programs for children with disabilities ("PPCD") where students with disabilities attend with typically developing children who are tuition paid students; a communication program for students who only have IEP communication goals, Spanish special education classroom, self-contained classroom for students with more significant needs, a centralized structured classroom for students who need a high degree of structure and individual direct instruction among other early childhood programs. The three-year-old, PPCD classes at Beaty have a maximum enrollment of 12 students with an opportunity for six students

with IEPs and six tuition students per class; the four-year-old, PPCD classes have a maximum enrollment of 15 students, with an opportunity for six students with IEPs and nine tuition students per class. All teachers at Beaty are special education certified. Additionally, Beaty has Speech and Language Pathologists ("SLPs"), teaching assistants, OTs, and physical therapists ("PTs") on campus, along with itinerant support staff persons. The PPCD classrooms have one classroom teacher, one teaching assistant, and a SLP that comes on alternating days. [Tr. Vol. II, Pages 128-135; Petitioner's Exhibit 20]

13. The teacher to student ratio in Petitioner's class at TLC is approximately 2:26. Petitioner's teacher at TLC does not have a college degree and is not certified or licensed to teach in Texas public schools. There are no OTs or STs on staff at TLC and there is no occupational therapist that assists Petitioner during lunch at TLC. [Tr. Vol. II, Pages 100, 112-113, 120-123, 151]

14. Upon enrollment in the District, since no data existed regarding Petitioner's need for ESY, the ARD committee did not consider ESY. His teacher saw no indicators that Petitioner would regress during the summer months, and ESY was not offered to Petitioner for the summer, 2005. No ARD meeting was held to consider ESY for the summer, 2005. [Tr. Vol. II, Page161]

15. At Beaty, Petitioner, who was 3 years old at the time, demonstrated some aggression toward his teachers. After the use of picture supports and behavioral supports, the behaviors went away after one or two weeks. [Tr. Vol. II, Pages 251-252]

16. During Petitioner's enrollment at Beaty, Petitioner's parents observed that he cried often on

the way to school and after his mother picked him up at the end of the school day. He had difficulty making decisions and regularly woke up several times a week and was inconsolable. At a March parent teacher conference, Petitioner's parent discussed what she believed were increasing negative behaviors, lack of progress in speech, a need for intensive summer therapy, and other areas of concern. After receiving no response after the conference, the parents proceeded with private evaluations by Advanced Therapy Services ("ATS") to qualify Petitioner for services, and began private therapy in May, 2005 without giving notice to the District of their intent to privately place Petitioner. [Tr. Vol. I, Pages 44-48, 139]

17. Petitioner re-enrolled in TLC at the end of the spring semester, May, 2005. TLC had stopped its curriculum for the summer. Upon Petitioner's return, TLC experienced behavior problems and potty training issues with Petitioner. [Tr. Vol. II, Pages 104-107]

18. During the summer, 2005, R. H.'s parents provided him with private ST and OT. They discontinued the services in August while they worked with the District in the formulation of his IEPs. The parents noticed deterioration in Petitioner's language skills and some basic fine motor skills during that month and resumed ST. [Tr. Vol. I, Page 40-41]

19. Petitioner's parents contacted the Beaty principal affirming their belief that Petitioner needs a volume of typically-developing peers and a longer school day, and requested an ARD meeting. The District wanted to observe Petitioner at Beaty before the ARD meeting. In response, the parents notified the

District that they would not remove Petitioner from TLC until an agreement could be made regarding his IEP, and offered to allow the District to observe Petitioner at TLC. [Petitioner's Exhibits 4,5; Tr. Vol. I, Pages 54-58]

20. An ARD meeting was held August 15, 2005 and resumed Augusts 23 during which the parents presented the private evaluation results. Their requested changes were discussed. The District wanted to do its own OT evaluation, an articulation evaluation, a functional behavioral assessment, and an in-home training assessment within one month. [Tr. Vol. I, Page 68; Petitioner's Exhibit 12]

21. Petitioner has continued to attend TLC since the summer, 2005. He arrives between 9:00-9:30 a.m., and typically leaves at 5:30 p.m. [Tr. Vol. I, Page 58]

22. Petitioner has tactile defensiveness issues and it is difficult to get him to eat new foods independently in the school setting. Presently, Petitioner continues to refuse to eat at lunchtime at TLC. At home, he refuses to try prepared foods unless heavy prompts are used with him. Even with prompts, he often refuses. Petitioner's IEP includes goals to address those issues. [Tr. Vol. I, Page 37; Petitioner's Exhibit 2, 12, 14, and 22]

23. From August, 2005 to January, 2006, the District held several ARD meetings and many efforts were made to come to an agreement for Petitioner's IEP. [Petitioner's Exhibits 12, 14, 22, and 31]

24. The District refused Petitioner's request to increase his educational program to a full day, refused to place him at TLC at District expense, and refused to provide 90 minutes of individual ST and 30 minutes of group therapy. [Petitioner's Exhibit 32]

25. The District agreed to increase Petitioner educational program from 2 hours 45 minutes per day to 3 hours 45 minutes, adding time for lunch with peers and IEP goals for his eating issues. It offered 75 minutes of group ST and 15 minutes of individual ST. [Petitioner's Exhibit 32]

26. A 25 hour week of instruction for children with autism can be a combination of intensive classroom, intensive home, or intensive individual instruction. Individual instruction by a SLP is important because communication disorder is a hallmark characteristic of autism spectrum disorder; thus, the SLP should be in the classroom on a regular, daily basis for an extended period of time. [Tr. Vol. II, Pages 59-60]

27. Apraxia is a speech disorder that is difficult to diagnose and needs to be done over time in order to account for a child's language skills or a possible language disorder. Its characteristics can be seen in many other speech disorders. [Tr. Vol. III, Page 78-81]

28. Least restrictive environment at the pre-school age is within the context of meaningful daily activities with their typically developing peers in meaningful tasks such as play and reading stories. Children with autism often fail to generalize skills that are taught in a one on one setting. [Tr. Vol. III, Pages 96-97]

29. Dual enrollment was offered to Petitioner, but was not accessed. [Tr. Vol. II, Pages 225, 236]

30. At the parents' request, the mastery level of some of R. H.'s proposed objectives are higher than originally proposed. Although the proposed short term objectives for the 2005-2006 school year are not agreed upon, the following is a summary of those

objectives which incorporate Petitioner's parents requests:

- Correctly use pronouns at the sentence level
- Initiate greetings and closures in a variety of school settings at least two times per day
- Retell a familiar story in 5 consecutive session
- Indicate understanding of concepts in unstructured classroom activities to include: first, middle, last, next to, before and after
- Parent training to assist R. H. with developing a tolerance to changes in his environment, expand his food varieties to try and accept new food, and assist with learning to toilet independently
- Expand food varieties to try one new food per week and learn to accept without protest two new foods per month
- Attend to speaker by making visual regard before following instructions
- Actively play with at least 3 toys as designed for 10 minutes with only verbal prompts for 3 consecutive days
- Take preferred items from a peer, 2 per day without prompts for 3 consecutive days
- Participate in classroom tactile activities for 1-2 minutes without protest [Petitioner's Exhibit 31; Respondent's Exhibit 5]

Discussion

Was a resolution settlement agreement reached; if so, did the District breach the agreement?

If parties to a due process proceeding reach a resolution to the dispute, the IDEA 04 requires the parties to execute a legally binding agreement that is signed by both the parent and a District representative with authority to bind the District.

Such agreement can be voided by either party within three business days of the agreement's execution. 20 U.S.C. § 1415(f)(1)(B)(iii) and (iv). Although the parties in this matter participated in a resolution session, they did not sign a written settlement agreement. Petitioner failed to prove that a resolution settlement agreement was reached by the parties. Tatro v. State of Texas, 703 F.2d 832 (5th Cir. 1983), aff'd, 468 U.S. 883 (1984); Schaffer v. Weast, 126 U. S. 528 (2005). For the spring semester, 2005, did the District consider the full continuum of placement options, and was the placement for Petitioner appropriate?

The principal of Beaty was present at the December, 2004 ARD meeting and is knowledgeable of the continuum of placement options at the District. Although every type of classroom at Beaty were not specifically discussed, the committee discussed an appropriate option for R. H. in light of his educational needs for small group and one-on-one instruction and determined that the integration classroom was appropriate. Petitioner does not prevail on the issue regarding the District's failure to consider a continuum of placement options. Tatro v. State of Texas, 703 F.2d 832 (5th Cir. 1983), aff'd, 468 U.S. 883 (1984); Schaffer v. Weast, 126 U. S. 528 (2005). The appropriateness of Petitioner's placement will be discussed in the FAPE discussion below.

Was the District's placement of Petitioner in the spring semester, 2005, and its proposed placement for the 2005-2006 school year in the LRE; if not, did such placement result in a denial of FAPE to Petitioner?

Public school districts must comply with the IDEA procedures for identifying children with disabilities who need special education, and delivering appropriate services as necessary to provide a free and appropriate public education (FAPE). 20 U.S.C. § 1412(a)(1); Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, (1982); Cypress Fairbanks Independent School District v. Michael F., 118 F.3d 245 (5th Cir. 1997).

The Fifth Circuit has further defined a free appropriate public education by delineating four factors to consider as indicators of whether an educational plan is reasonably calculated to provide the requisite benefits: 1) Is the educational program individualized on the basis of the child's assessment and performance; 2) Is the program administered in the least restrictive environment; 3) Are the services provided in a coordinated and collaborative manner by the key stakeholders; and 4) Are positive academic and non-academic benefits demonstrated? Cypress Fairbanks Independent School District v. Michael F., 118 F.3d at 253.

Is the educational program individualized on the basis of the child's assessment and performance?

The District performed a FIE prior to Petitioner's third birthday. The evaluation results were the basis for Petitioner's IEPs that were developed in December, 2004. Speech therapy was recommended while occupational therapy was not although Petitioner's issues regarding tactile defensiveness during eating were addressed in his IEPs. The assessment team concluded that Petitioner did not need OT or PT because he had the necessary skills to

adequately perform in a classroom environment. During the only semester that Petitioner attended Beaty, although he had not mastered all of the IEP goals which were written for a year, he made overall progress on those goals by the end of the spring semester, 2005. Although Petitioner's parents contended that he suffered psychological side effects while at Beaty, Petitioner failed to prove that his problems were caused by his presence at Beaty.

In August, 2005, the ARD committee met at the parent's request to review Petitioner's IEP. A series of ARDs followed throughout the semester. The record reflects that the parents were active participants in the preparation of Petitioner's goals and objectives, and changes were incorporated as a result of such participation. Prior to a private physical therapy evaluation of Petitioner in the fall, 2005, there had been nothing to indicate a need for PT. The ARD committee reviewed the assessment and reports from R. H.'s TLC teacher and determined that PT was not necessary for Petitioner to adequately perform in a classroom environment.

There are two overarching issues that prevented an agreement regarding Petitioner's IEP: length of school day and individual speech therapy. Petitioner's parents do not disagree with the benefits for group speech therapy, but believe R. H. should have more individual sessions. The parents want Petitioner to have individual ST in an amount of 30 minutes, three times per week. The District proposed 15 minutes of one-to-one ST and group ST for 75 minutes per week, an increase from 60 minutes group therapy that was provided in the 2005 spring

semester. The record reflects that R. H. mastered some speech skills and progressed on all skills with the 60 minute group therapy that he received in the 2005 spring semester.

Petitioner's parents want an extended school day to total 25 hours per week. While a 25 hour per week program may be the general recommendation, the District's obligation under the IDEA 04 is to create an education program based on Petitioner's individual and unique needs. The District offered to increase Petitioner's school day from 13.75 to 18.75 hours per week to include lunchtime during which he would be with peers and his eating issues could be addressed by district personnel with the guidance of an OT. While there was expert testimony in support of both positions, I find that Petitioner's spring semester, 2005 IEP and the proposed educational program for 2005-2006 are individualized on the basis of his assessment and performance.

Is the program administered in the LRE? The IDEA requires that to the maximum extent appropriate, children with disabilities are educated with children who are non-disabled and that removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 20 U.S. C. § 1412 (a)(5). Although a school is not required to try every conceivable supplementary aid or service, it should make more than a token effort. If education in a regular classroom with supplementary aids and services cannot be achieved satisfactorily, the school

must mainstream the child to the maximum extent appropriate. Daniel R. R. v. State Board of Education, 874 F.2d 1036 (5th Cir. 1989).

In this case, there are no "regular" classrooms for three and four year old students. Compulsory school age in the state of Texas is six years. Tex. Educ. Code § 28.085(b). However, the District offers a variety of classes for three and four year old students, some of which are entirely for typically developing students; these classes are for students who are limited-English, Spanish speaking, or students whose only IEP goals and objectives are in the area of communication. The PPCD classrooms are made up of both children with disabilities and typically developing children, the ratio of which may be fluid and vary from approximately 1/3 students with IEPs, and 2/3 typically developing students to a more even ratio of ½ students with IEPs and ½ typically developing students.

Although Petitioner believes that a larger number of typically developing peers is more desirable such as the student make-up of TLC, other factors should be considered. Petitioner's expert witness, Dr. Felini-Smith, testified that the District's PPCD program strives to have an even mix of students and to provide an array of developmentally appropriate activities and keep the class size relatively small compared to many pre-school settings. She acknowledged that the teachers at Beaty are special educators knowledgeable of strategies for working with autistic students such as Petitioner. Her reservations with the program were the regression that was reported to her and the length of the school

day. District personnel did not see regression in Petitioner; in fact, the progress notes in his IEPs and witness testimony at hearing support that he was making progress.

Petitioner wants to continue at TLC at District expense and argues that TLC is the least restrictive environment. However, Petitioner's teacher at TLC is not a certified special educator, the student to teacher ratio is high, and no SLP is on staff. ARD documents reflect that Petitioner's parents do not believe that the teachers at TLC are trained to recognize sensory issues that affect his participation at lunch. In light of the fact that Petitioner requires an individualized education program to address his speech and communication needs and his tactile defensiveness issues, and his need for small group and one to one instruction, the Beaty PPCD program is the least restrictive environment for Petitioner.

Are services provided in a coordinated and collaborative manner by the key stakeholders: At Beaty, there is a SLP in the classroom on alternating days. During the spring semester, 2005, Petitioner's classroom teacher and the SLP worked closely together. An occupational therapist is on staff to assist with strategies for Petitioner's eating issues which can be addressed during lunchtime with his peers. In the lengthy ARD meetings that began in August, 2005, R. H.'s parents took an active part in the development and revision of his IEP. In contrast, the record reflects that there is no collaboration between the TLC teacher and the key stakeholders. The teacher testified that she did not interact with the private service providers. Services are provided

at Beaty in a coordinated and collaborative manner by the key stakeholders.

Are positive academic and non-academic benefits demonstrated? The record reflects that Petitioner benefited from his one semester at Beaty. His parent admitted to improvement in March, 2005. During the August, 2005 ARD meeting, his parent agreed that he was making progress within the school day. At the January 11, 2006 ARD meeting his mother said she believed he made *more* progress in a one to one setting. She did not say he made no progress in a group setting such as the District recommends. Commendably, Petitioner's parents want him to make maximum progress and seem to feel a sense of urgency regarding his needs. However, maximum progress is not the test. The educational benefit that an IEP is designed to achieve must be meaningful and likely to produce progress, rather than regression or trivial educational advancement. Although the educational benefit must be meaningful, schools are not required to maximize a child's potential or provide the best program. Cypress-Fairbanks Indep. Sch. Dist. v. Michael F., 118 F.3rd 245 (5th Cir 1997); cert. denied, 522 U.S. 1047 (1998). Petitioner's overall progress at Beaty was meaningful.

Did the District fail to consider or provide ESY to Petitioner during the summer, 2005?

At the time Petitioner enrolled in the District in January, 2005, there was no data available to use to determine a need for ESY. The District relies on the teachers' observations of regression after breaks from school. In Petitioner's case, those breaks consisted of

weekends and spring break. His teachers did not see any regression following those breaks. However, on March 22, 2005, Petitioner's parent met with his teacher and gave her a list of her concerns which stated, "Due to the critical, limited window of opportunity for intervention benefits for autism spectrum disorders, intensive summer therapy is a must." A copy of the document was given to Petitioner's teacher to pass on to the building principal. Although the record reflects that Petitioner's teacher believed that she and the parent had resolved that concern, Petitioner's parent did not consider it resolved. No ARD meeting was held. When Petitioner's parent did not hear from the District, in April, 2005, she proceeded to obtain new evaluations of Petitioner and to seek a summer program for Petitioner. Petitioner enrolled at TLC and his parents provided him with OT services and 20 individual ST sessions of 90 minutes per week from May, 2005 to August, 2005.

Having been made aware of the parent's concerns at the mid-point of Petitioner's first semester in the District, and in light of summer's approach, it is reasonable to expect the District to respond by scheduling an ARD meeting at which time the necessary decision makers could consider the need for ESY.

The IDEA 04 requires a district to provided ESY if a *child's IEP team* determines, on an individual basis, that the services are necessary for the provision of FAPE to the child. 20 U.S.C. 1412 (a)(1) [emphasis added]. The Texas Education Agency has specified criteria for determining when ESY must be provided.

The ARD committee must make the determination regarding a need for ESY. Documentation must demonstrate that in one or more critical areas addressed in the student's current IEP objectives, the student reasonably may be expected to exhibit severe or substantial regression that cannot be recouped within a reasonable period of time. 19 Tex. Admin. Code §89.1065[emphasis added]. The District failed to consider ESY to Petitioner during the summer, 2005 and, in so doing, denied FAPE to Petitioner.

Compensatory education is an equitable remedy available for substantive or procedural IDEA violation. Burlington Sch. Comm. V. Department of Educ., 471 U.S. 359 (1985); Alamo Heights Indep. School Dist. V. State Bd. Of Educ., 790 F.2d 1153 (5th Cir. 1986). In fashioning appropriate equitable relief, consideration is given to the conduct of the parties along with the nature of relief requested. Parents of Student W. v. Puyallup School District, No.3, 21 IDELR 723 (9th Cir. 1994). Due to the parents' concern regarding a limited window of opportunity to develop speech and language skills and their conviction that R. H. needs occupational therapy, either speech therapy, occupational therapy, or both services would be appropriate compensatory services.

Petitioner's Request for Reimbursement

Regarding Petitioner's request for reimbursement for the 2005 summer program, he cannot prevail since he did not comply with the IDEA 04 notice requirement prior to his unilateral enrollment at TLC. 20 U.S.C. § 1412(a)(1O)(C)(iii). Petitioner also requests reimbursement for costs incurred from the

fall, 2005 through the present about which he provided notice to the District, along with his costs for privately obtained evaluations. To receive reimbursement, Petitioner must discharge two burdens of proof. First, he must show that Respondent's proposed 2005-2006 program was inappropriate. Second, he must show that the TLC program is appropriate. If Petitioner fails to discharge either burden, he is not entitled to reimbursement. However, if the Hearing Officer finds that the District's proposed program is appropriate, it is not necessary to reach the issue of the appropriateness of the private school placement. School Committee of Burlington v. Department of Education of Massachusetts, 471 U.S. 359 (1985); Florence County Sch. Dist. Four v. Carter, 114 S.Ct. 365 (1993); Tatro v. State of Texas, 703 F.2d 823, aff'd, 468 U.S. 883 (1984). Having previously determined that Respondent's program is appropriate, nothing further must be determined regarding reimbursement for costs.

Conclusions of Law

1. R H. is a child in the Plano Independent School District who is eligible for special education services under the provisions of the IDEA 04 as a child with autism and speech impairment.

2. Respondent, Plano Independent School District, is an independent school district duly constituted in and by the state of Texas, and subject to the requirements of the IDEA 04. Plano Independent School District is RH.' s resident district and has the responsibility to provide Petitioner with a free appropriate-public education under the IDEA O 20 U.S.C. §1401(a)(18).

3. Petitioner and Respondent did not reach a resolution settlement agreement. 20 U.S.C. § 1415(f)(1)(B)(iii) and (iv); Tatro v. State of Texas, 703 F.2d 823 (5th Cir, 1983), aff'd, 468 U.S. 883 (1984); Schaffer v. Weast, 126 U. S. S28 (2005).

4. For the spring semester, 2005, the District considered the full continuum of placement options, and its placement for Petitioner for the spring semester, 2005, was appropriate. Tatro v. State of Texas, 703 F.2d 823 (5th Cir, 1983), aff'd, 468 U.S. 883 (1984); Schaffer v. Weast, 126 U. S. 528 (2005).

5. The District's placement of Petitioner during the spring semester, 2005, and its proposed placement for the 2005-2006 school year is in the LRE. 20 U.S.C. §1412(a)(I) and (5); Daniel R. R. v. State Board of Education, 874 F.2d 1036 (5th Cir. 1989); Cypress Fairbanks Independent School District v. Michael F., 118 F.3d 245; Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982); Tatro v. State of Texas, 703 F.2d 823 (5th Cir, 1983), aff'd, 468 U.S. 883 (1984); Schaffer v. Weast, 126 U. S. 528 (2005).

6. The District failed to consider or provide ESY to Petitioner during the summer, 2005; such failure was denial of FAPE. 20 U.S.C. 1412 (a)(1);19 Tex. Admin. Code §89.1065.

Order

Based upon the record of this proceeding and the foregoing Findings of Fact and Conclusions of Law, Respondent is ordered to take the following actions:

1. Convene an Admission, Review, and Dismissal Committee meeting at the earliest practicable time to consider Petitioner's needs for ESY during the 2006 summer session; and

2. Provide Petitioner with either individual or group speech therapy services, occupational therapy services, or both, as compensatory services, in the total amount of 15 hours to begin as soon as practicable. These compensatory services shall be in addition to the speech therapy services that the District has offered to Petitioner and shall occur outside Petitioner's proposed school day. The ARD committee shall make the determination of the schedule and individual session lengths based on Petitioner's age and individual needs.

All other relief not specifically granted is hereby DENIED.

The district shall timely implement this Decision within 10 school days in accordance with 19 T.A.C. §89.1185(q) and 34 C.F.R. §300.514. The following must be provided to the Division of **Special Education Programs and Complaints** at the Texas Education Agency and copied to the Petitioner within 15 school days from the date of this Decision: 1.) Documentation demonstrating that the Decision has been implemented; or 2.) If the timeline set by the Hearing Officer for implementing certain aspects of the Decision is longer than 10 school days, the district's plan for implementing the Decision within the prescribed timeline, and a signed assurance from the superintendent that the Decision will be implemented.

Finding that the public welfare requires the immediate effect of this Final Decision, the Hearing Officer makes it effective immediately.

SIGNED on the 30th day of May, 2006.

_____

Brenda Rudd
Special Education
Hearing Officer
For the State of
Texas

TABLE 1

Evaluation Date	**Age of Petitioner**	**Evaluation Performed**	**Results**
11.15.04	2yrs. 9mos.	Full Individual Evaluation (FIE) by District	a. Brief IQ 105 Evaluation (FIE) b. Behaviors that impede adequate development of interpersonal skills c. Difficulty with flexible thinking d. Transition difficulties e. CARS score 30 w/I range of Autism Spectrum Disorders f. No difficulties that would prevent progress on goals; no need for OT g. Significant disruptions in ability to communicate and use language; uses jargon, word approximations a few single words and occasional 2-3 word phrase h. Does not interact with peers and has difficulty attending to large group instruction

			i. Can adequately bite, chew and swallow but has limited diet [Petitioner's Exhibit 1; Respondent's Exhibit 1]
4.12.05	3 yrs. 2 mos. Approx.	Speech Assessment by Advanced Therapy Services (ATS) at request of parents	a. Mild expressive language delay and moderate receptive language delay; age equivalent 2 yrs. 8 mos. b. Oral aversion [Petitioner's Exhibit 28]
4.28.05	3 yrs. 2 mos. Approx	Occupational Therapy (OT) Assessment by ATS at request of parents	a. Peabody Developmental Motor Scales to assess reflexes, gross motor and fine motor skills. Petitioner's result: grasping age equivalent 14 months; visual-motor integration age equivalent 35 months b. Definite differences with vestibular processing and oral processing; definite difference in sensory input affecting emotional response; probable difference with emotional/social responses and behavioral outcomes of

			sensory processing c. Problem areas: decreased fine motor skills, visual-motor integration, sensory processing and self-care skills. d. Currently being potty trained [Petitioner's Exhibit 28]
9.15.05	3 yrs. 8 mos. Approx	Physical Therapy Assessment by ATS at request of parents	a. Peabody Developmental Motor Scales to assess reflexes, gross motor, fine motor skills; Petitioner rated 33 mos.-Stationary, 34 mos.-Locomotion, and 30 mos.- Object manipulation[Petitioner's Exhibit 28]
9.14.05	3 yrs. 8 mos. Approx	Addendum to FIE by District (articulation)	a. Goldman-Fristoe Test-difference in percentage consonant correct in single words and connected speech 8%; does not qualify for articulation therapy [Petitioner's Exhibit 13, Respondent's Exhibit (articulation) 8]
9.16.05	3 yrs. 8 mos. Appr	FIE-OT by District	a. No difficulty with fine motor, gross motor, self-help, or sensory processing skills that

	ox		impaired functioning in classroom b. Parents reported Petitioner is displaying tactile defensiveness to some grooming and health procedures in home setting, such difficulties do not appear to affect his ability to perform in the classroom. No occupational therapy needed to support goals and objectives in IEP. [Petitioner's Exhibit 13, Respondent's Exhibit 9)
9.3.05	3 yrs. 8 mos. Approx	FIE-Related Service of In-Home and Parent Training by District	a. Parents concerned with Petitioner's lack of self-initiated use of toilet, fixation on his written name, limited diet, tactile defensiveness to things such as tags and long sleeves on clothing, and tantrums when told no b. Parents invited to participate in meetings on topic of social skills, behavior, and potty

			training for a total of 7.5 hours. c. Related service of parent training recommended as individualized session of 3 hours by a district home trainer to help parents implement strategies learned in parent training and support meetings. [Petitioner's Exhibit 13]
9.16.05	3 yrs. 8 mos. Approx	Addendum to FIE-Behavioral assessment by District	a. Private and District preschool staff reported positive behaviors in school setting with some difficulty managing transitions from preferred to non-preferred tasks and playing appropriately with peers. b. Parents report more difficult behaviors in home setting regarding trying new foods, self-regulatory sensory and emotional needs, and adapting to routine changes. c. Petitioner's behavior consistently rated across setting within

			average range compared to his same age peers [Petitioner's Exhibit 13, Respondent's Exhibit 10]
12.1.05 report date	3 yrs. 9 mos. Approx. at evaluation	Individual Educational Evaluation by Linda Felini-Smith, PhD at request of parents	a. Full scale IQ-127;superior range of cognitive functioning compared to age mates b. PEP-R test for children with autism. Petitioner's performance was commensurate with his above average cognitive ability c. CELF-P test for language comprehension and expression tasks: below average d. Average range for single word vocabulary, comprehension of single words; articulation was good e. Phrases and sentences were intelligible, but when intelligibility decreased, it was sometimes due to jargon which appeared to be triggered by overwhelming

			language demands f. Vineland assessment of adaptive (day to day) functioning: within average range with the exception of daily living skills g. Summary: Petitioner has language and social deficits associated with autism disorder; nonverbal cognitive skills in superior range compared to same age peers; moderate communication disorder characterized by deficits in processing and production of language and pragmatics, or interactive use of language; evidences mild-moderate developmental apraxia of speech [Respondent's Exhibit 19]

DOCKET NO. 108-SE-0106

R. H.	§	BEFORE A SPECIAL
b/n/f *M.* H. & E.H.	§	EDUCATION
Petitioner	§	
	§	
V.	§	HEARING OFFICER
	§	FOR THE
PLANO INDEPENDENT	§	
SCHOOL DISTRICT	§	
Respondent	§	ST ATE OF TEXAS
	§	

SYNOPSIS

Issue: Whether or not a resolution session agreement between the parties was reached in the fall semester, 2005 and, if an agreement was made, whether or not the District failed to comply with such agreement.

Held: For Respondent

Citation: 20 U.S.C. § 1415(f)(1)(B)(iii) and (iv); Tatro v. State of Texas, 703 F.2d 823 (5th Cir, 1983), aff'd, 468 U.S. 883 (1984); Schaffer v. Weast, 126 U. S. 528 (2005).

Issue: For the spring semester, 2005, whether or not the District considered the full continuum of placement options, and whether or not the District's placement for Petitioner for the spring semester, 2005, was appropriate.

Held: For Respondent

Citation:	Tatro v. State of Texas, 703 F.2d 823 (5th Cir, 1983), aff'd, 468 U.S. 883 (1984); Schaffer v. Weast, 126 U. S. 528 (2005).
Issue:	Whether or not the District's placement of Petitioner during the spring semester, 2005, and its proposed placement for the 2005-2006 school year was in the least restrictive environment ("LRE") and resulted in a denial of F APE to Petitioner.
Held:	For Respondent
Citation:	20 U.S.C. §1412(a)(1) and (5); Daniel R. R. v. State Board of Education, 874 F.2d 1036 (5th Cir. 1989); Cypress Fairbanks Independent School District v. Michael F., 118 F.3d 245; Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982)
Issue:	Whether or not the District failed to consider or provide ESY to Petitioner during the summer, 2005.
Held:	For Petitioner
Citation:	20 U.S.C. 1412 (a)(1); 19 Tex. Admin. Code §89.1065

R.H. b/n/f M.H. and E.H. v. Plano Independent School District
Docket No. 108-SE-0106
Amended Decision of Hearing Officer

APPENDIX B – REPORT AND RECOMMENDATION OF THE MAGISTRATE JUDGE AND ASSOCIATED ADOPTING ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS ORDERED MARCH 31, 2008

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS SHERMAN DIVISION

R.H., BY HIS PARENTS AND NEXT FRIENDS, EMILY AND MATTHEW H.	§	
Plaintiff,	§	CASE NO. 4:06cv352
v.	§	
PLANO INDEPENDENT SCHOOL DISTRICT	§	
Defendant.	§	

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Now before the Court are Defendant's Motion for Summary Judgment on the Administrative Record (Dkt. 15) and Plaintiff's Motion for Summary Judgment on the Administrative Record (Dkt. 38). Having reviewed the motions, responses, and the administrative record before it, the Court finds Defendant's Motion should be GRANTED, Plaintiff's Motion should be DENIED, and the findings of the Special Education Hearing Officer for the State of Texas in this matter should be affirmed.

BACKGROUND

Plaintiff, R.H., a four-year-old boy with a disability, has filed this civil action against Defendant Plano Independent School District ("PISD"), alleging violations of the Individuals with Disabilities Education Act. Specifically, Plaintiff alleges that Defendant has violated his rights under IDEA to be educated with his non-disabled peers to the maximum extent appropriate and to be educated in the least restrictive environment, in violation of his right to a free appropriate public education.

On January 25, 2006, Plaintiff requested a due process hearing from the Texas Education Agency, in accordance with IDEA, complaining of Defendant's actions. Following the due process hearing on April 4, 6, and 7, 2006, the Special Hearing Officer issued a decision in favor of Defendant. The Special Hearing Officer made the following conclusions of law relevant to R.H.'s case here:

- For the spring semester, 2005, the District considered the full continuum of placement options, and its placement for Petition for the spring semester, 2005, was appropriate.
- The District's placement of Petitioner during the spring semester, 2005, and its proposed placement for the 2005-2006 school year is in the LRE.
- The District failed to provide ESY to Petitioner during the summer, 2005 (A.R. I at 14).

Based on these findings and the record before her, the Special Hearing Officer ordered PISD to take the following actions:

1. Convene an Admission, Review, and Dismissal Committee meeting at the earliest practicable time to consider Petitioner's needs for ESY during the 2006 summer session; and

2. Provide Petitioner with either individual or group speech therapy services, occupational therapy services, or both, as compensatory services, in the total amount of 15 hours to begin as soon as practicable. These compensatory services shall be in addition to the speech therapy services that the District has offered to Petitioner and shall occur outside Petitioner's proposed school day. The ARD committee shall make the determination of the schedule and individual session lengths based on Petitioner's age and individual needs. (A.R. I at 15).

Plaintiff now brings this civil action pursuant to 20 U.S.C. §1415(i)(2)(A) alleging that the hearing officer failed to properly interpret federal law and that her findings are not supported by the record. Plaintiff claims that PISD's placement of R.H. at Beaty Early Childhood School, a district preschool where both disabled and non-disabled children are enrolled, violated the IDEA. Plaintiff further argues that the appropriate placement for R.H. is at TLC, a private preschool which R.H. has attended and for which Plaintiff seeks reimbursement here.

STANDARD

This case arises under the IDEA, the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1482. The IDEA's purpose is "to ensure that all

children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A).

States receiving federal assistance under the IDEA must: (1) provide a "free appropriate public education" ("FAPE") to each disabled child within its boundaries, and (2) ensure that such education is in the "least restrictive environment" ("LRE") possible. *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 247 (5th Cir.1997); 20 U.S.C. § 1412(1), (5). The FAPE provided must be developed to each disabled child's needs through an "individual educational program" ("IEP"), which is a written statement prepared at a meeting attended by a school district representative, a teacher, the child's parents or guardians, and, when appropriate, the child. *Michael F.*, 118 F.3d at 247; *see* 20 U.S.C. § 1414(d). In Texas, the committee responsible for preparing an IEP is known as an Admissions, Review, and Dismissal Committee ("ARD Committee").

The role of the judiciary under the IDEA is limited, leaving the choice of educational policies and methods in the hands of state and local school officials. *White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 377 (5th Cir. 2003), *citing Flour Bluff Indep. Sch. Dist. v. Katherine M.*, 91 F.3d 689, 693 (5th Cir. 1996). The Court must reach an independent decision based on a preponderance of the evidence. *Houston Indep. Sch. Dist. v. Bobby R.*,

200 F.3d 341, 347 (5th Cir. 2000); *Cypress- Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 252 (5th Cir. 1997); *Teague Indep. Sch. Dist. v. Todd L.*, 999 F.2d 127, 131 (5th Cir. 1993). However, this requirement "is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review." *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 206, 102 S. Ct. 3034. 73 L. Ed.2d 690 (1982). Instead, "due weight" is to be given to the hearing officer's decision. *Id.* Thus, "courts must be careful to avoid imposing their view of preferable educational methods upon the States. The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child." *Id.* at 207. The Court's task therefore is not to second guess PISD's decisions or impose its own plans for the education of disabled students; rather, it is the narrow one of determining whether PISD complied with the IDEA. *White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 377 (5th Cir. 2003); *see also Daniel R.R. v. State Bd. of Edu.*, 874 F.2d 1036, 1048 (5th Cir. 1989).

The party seeking relief under the IDEA – Plaintiff here – bears the burden of proof. *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528, 535-537 (2005). Specifically, "a party attacking the appropriateness of an IEP established by a local educational agency bears the burden of showing why the IEP and the resulting placement were inappropriate under the

IDEA." *Michael F.*, 118 F.3d at 252. The IDEA also creates a presumption in favor of the education plan proposed by the school district, and places the burden of proof on the party challenging it. *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 248 (5th Cir. 1997); *Alamo Heights Indep. Sch. Dist. v. State Bd. of Edu.*, 790 F.2d 1153, 1158 (5th Cir. 1986); *Salley v. St. Tammany Parish Sch. Bd.*, 57 F.3d 458, 467 (5th Cir. 1995); *Teague Indep. Sch. Dist. v. Todd L.*, 999 F.2d 127, 132 (5th Cir. 1993).

Here, the parties concur that the is no need for additional evidence or discovery to be conducted in this proceeding. Therefore, the Court will determine the merits of the case based on the administrative record. *Austin Indep. Sch. Dist. v. Robert M.*, 168 F. Supp.2d 635, 638 (W.D. Tex. 2001), *aff'd*, 54 Fed. Appx. 413 (5th Cir. 2002); *see also Hunger v. Leininger*, 15 F.3d 664, 669 (7th Cir. 1994), *cert. denied*, 513 U.S. 839, 115 S. Ct. 123 (1994).

Both parties have filed summary judgment motions and responses framing their positions in light of the administrative record before the Court. Notably, many of the facts alleged by Plaintiff in his summary judgment pleadings do not refer to specific portions of the administrative record. The Court notes that, in summary judgment proceedings, the parties are expected to cite to specific facts in the record. *Webb v. Cardiothoracic Surgery Assoc. of North Texas, P.A.*, 139 F.3d 532, 536 (5th Cir. 1998). The citations to evidence must be specific, as the district court is not required to "scour the record" to determine whether the evidence raises a genuine issue of material fact. E.D. TEX. LOCAL R. CV-56(d); *see also Ragas v.*

Tennessee Gas Pipeline Co., 136 F.3d 455, 458 (5th Cir.1998) (Rule 56 does not require court to rifle through the record in search of evidence to support a party's opposition to summary judgment). Unsubstantiated and subjective beliefs and conclusory allegations and opinions of fact are not competent summary judgment evidence. *Morris v. Covan World Wide Moving, Inc.*, 144 F.3d 377, 380 (5th Cir. 1998). The Court has therefore based its analysis primarily on those portions of the record specifically cited by the parties.

ANALYSIS

In this case, Plaintiff seeks reimbursement for the cost of the minor's schooling at TLC, a private school his parents enrolled him in. For parents of a disabled child to be entitled to reimbursement for private schooling, they must show both that (1) the public placement violated the IDEA and that (2) the private school placement was proper under IDEA. *Florence County School Dist. Four v. Carter By and Through Carter*, 510 U.S. 7, 12-13, 114 S.Ct. 361, 365 (1993); *Town of Burlington v. Dep't. of Edu.*, 471 U.S. 359, 369-370, 105 S. Ct. 1996, 2002-2003 (1985). If reimbursement is appropriate, it can be retroactive from the time of placement in the private school. *Id.*

Thus, the Court will first look to whether PISD's placement of Plaintiff at Beaty Early Childhood School, a school within the District, violated the IDEA. If the Court finds that it did not, then it need not reach an analysis of the propriety of the private school placement at TLC.

Under the IDEA, public school districts in states receiving federal funds must provide each child with a FAPE. 20 U.S.C. § 1412(a)(1). To establish that PISD failed to provide R.H. with a FAPE, Plaintiff must first demonstrate that: (i) PISD failed to comply with the procedures set forth in IDEA; or (ii) the individualized education program (IEP) developed by PISD through the IDEA's procedures was not reasonably calculated to enable R.H. to receive educational benefits. *Bd. of Edu. v. Rowley*, 458 U.S. 176, 207-08, 102 S. Ct. 3034, 3051 (1982). Because Plaintiff alleges no procedural violations of the IDEA here, the Court focuses on whether PISD developed an IEP for R.H. that was reasonably calculated to enable him to receive educational benefits.

In determining whether an IEP is appropriate, the Fifth Circuit has outlined four factors to consider: (1) whether the program is individualized on the basis of the student's assessment and performance; (2) whether the program is administered in the least restrictive environment; (3) whether the services are provided in a coordinated and collaborative manner by the key "stakeholders"; and (4) whether positive academic and non-academic benefits are demonstrated. *Michael F.*, 118 F.3d at 253.

In other words, an IEP must be geared to provide "meaningful" educational benefit. *Rowley*, 458 U.S. at 192; *see also Michael F.*, 118 F.3d at 248. The inquiry does not turn, however, upon whether the District provided R.H. with an education designed to maximize his potential. *Michael F.*, 118 F.3d at 247-48. As the IDEA guarantees a "basic floor or

opportunity," the District is only bound to provide "access to specialized instruction and related services which are individually designed to provide educational benefit." *Rowley*, 458 U.S. at 201. "Nevertheless, the educational benefit to which the [IDEA] refers and to which an IEP must be geared cannot be a mere modicum or de minimis; rather, an IEP must be 'likely to produce progress, not regression or trivial educational advancement.'" *Michael F.*, 118 F.3d at 248 (footnotes omitted) (quoting *Bd. of Educ. of the E. Windsor Reg'l Sch. Dist. v. Diamond*, 808 F.2d 987, 991 (3d Cir.1986)).

Thus, the Court will examine the administrative record under the four *Michael F.* factors listed above to determine whether R.H.'s IEP was appropriate.[1]

1. Individualized IEP Based on Student's Assessment and Performance

The Court finds, by a preponderance of the evidence before it, that the IEP developed for R.H. was individualized for his needs. He was evaluated, observed, and assessed by PISD and a team of professionals, including a psychologist, speech therapist, an occupational therapist, and an

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[1] The Court notes that Defendant has argued that Plaintiff has waived any challenge to the conclusions as to some of these factors under 20 U.S.C. § 1415(i)(1)(A), but has provided argument on them nonetheless. Because the record is not wholly clear as to which portions of the Special Hearing Officer's findings Plaintiff has challenged, to ensure a full and fair analysis as to the ultimate conclusion that R.H.'s IEP was appropriate, the Court has evaluated the record under all four factors.

education specialist (A.R. III at 678-741; 748-787). Additionally, PISD gathered information from R.H.'s parents and teachers at TLC to formulate an appropriate plan for him. R.H.'s IEP was based on this assessment which, in light of the record here, appears to have been thorough and individualized. Indeed, the record contains hundreds of pages evidencing such evaluations and assessments. *(See, e.g.*, A.R. II at 210-347, III at 678-873).

Throughout the record there is evidence of meetings between parents and school officials, ARD committee meetings, and District meetings, regarding the plan for R.H. The formulation of R.H.'s IEP was a clearly constant and evolving process. In addition to various classroom accommodations, R.H.'s IEP indicated that he needed to be in an environment with a low student to staff ratio and that he needed direct one-on-one instruction while transitioning between activities (A.R. III at 697, 711; A.R. IV, Hearing Transcript II 144, 161). Further, it appears that, as R.H.'s parents raised any concerns about his progress, PISD would conduct additional evaluations and would consider any additional evaluations submitted by R.H.'s parents. Other than the District's failure to provide summer schooling for 2005 (which the special hearing officer held did not comply with IDEA and which will be addressed later in this report), there is nothing in the record to indicate the PISD failed to respond to R.H.'s individualized progress or needs with some sort of conference with school officials and parents and a corresponding revision to his IEP.

R.H's parents specifically contest those portions of the IEP regarding the proposed length of school day and the amount of individualized speech therapy. While his parents believe he needed more individualized speech therapy rather than the 15 minute sessions, coupled with 75 minutes group sessions recommended by the District, the record indicates that R.H. made some progress in his speech skills with even 60 minutes group therapy. Therefore, the Court does not find, under a preponderance of the evidence, that the District's recommendation regarding speech therapy was insufficient for R.H.'s specific needs.

In regards to the length of the school day, after R.H.'s parents expressed concern, the District specifically proposed to extend the length of each school day to include lunch time so that R.H.'s eating, textural, and feeding issues could be addressed by District personnel and therapists. Plaintiff has not shown how the District's refusal to lengthen the school day more resulted in a failure to address any other individualized needs. As noted above, to be in compliance with the IDEA, a school district is not required to provide an education that maximizes a student's potential. Therefore, by a preponderance of the evidence before it, the Court agrees with the Special Hearing Officer and finds that the 2005 IEP and the proposed educational program for 2005-2006 school year were individualized to R.H.'s needs in light of his assessment and performance.

2. Services Provided in Coordinated and Collaborative Manner by Key "Stakeholders"

As with the individualized IEP, the record indicates extensive participation in R.H.'s educational plan by various professionals within the District (A.R. III at 678-693). The District relied upon teachers certified in special education, speech pathologists, occupational therapists, and school psychologists, among others, to evaluate R.H.'s needs. Additionally, R.H.'s parents were active in the development of his IEP. There is nothing in the record to indicate that his well-being was not the primary objective of both the District and his parents or that the key stakeholders did not work together in developing a plan. Moreover, the record reflects an educational plan for R.H. that incorporated the input and collaboration on all of these individuals, including periodic reports to and conferences with R.H.'s parents regarding his progress. Therefore, the Court finds by a preponderance of the evidence, as did the Special Hearing Officer, that R.H.'s IEP was developed and implemented in a coordinated and collaborative manner by the key stakeholders.

3. Demonstration of Positive Academic and Non-academic Benefits

Unfortunately, R.H. attended Beaty for only one semester, so the time period that the Court has to evaluate his progress is rather short. And, the Court agrees with the District that the true extent of how much R.H. would benefit from the IEP is hampered by the fact that he did not stay enrolled at Beaty for

the full 12-month period the IEP was developed for. However, the record sufficiently indicates that R.H. made some progress during that short period (A.R. III at 693-94, 700, 720-721; A.R. IV, Hearing Transcript II, at 255-262; A.R. IV, Hearing Transcript III, at 16-24). The possibility that he did not make as much progress as his parents would hope, while certainly unfortunate, does not mean he did not demonstrate some positive benefits from the IEP, sufficient to show the District formulated an appropriate IEP for his needs. Having weighed the record before it, the Court finds this element was satisfied.

4. Program Administered in Least Restrictive Environment

Whether PISD's program was administered in the least restrictive environment, or LRE, appears to be the gravamen of Plaintiff's complaint here. The IDEA requires that "to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in the regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. § 1412(a)(5)(A). Plaintiff argues that the decision of the Special Hearing Officer failed to comply with this provision and Fifth Circuit precedent. In *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036 (5th Cir. 1989), the Fifth

Circuit developed a two-part test to determine whether Section 1412 has been complied with:

> First, we ask whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given child. *See* § 1412(5)(B). If it cannot and the school intends to provide special education or to remove the child from regular education, we ask, second, whether the school has mainstreamed the child to the maximum extent appropriate. *See id.* A variety of factors will inform each stage of our inquiry; the factors that we consider today do not constitute an exhaustive list of factors relevant to the mainstreaming issue. Moreover, no single factor is dispositive in all cases. Rather, our analysis is an individualized, fact-specific inquiry that requires us to examine carefully the nature and severity of the child's handicapping condition, his needs and abilities, and the schools' response to the child's needs.

Daniel R.R., 874 F.2d at 1048. Plaintiff argues that the District did not comply with this requirement. The Court disagrees.

Plaintiff claims that placement at Beaty was not in the LRE because R.H. would have been exposed to a greater number of non-disabled peers if he attended TLC. The least restrictive environment has been defined by the Fifth Circuit as "not only freedom

from restraint, but the freedom of the child to associate with his or her family and able-bodied peers to the maximum extent possible." *Teague Indep. Sch. Dist. v. Todd L.*, 999 F.2d 127, 128 n.2 (5th Cir.1993) (emphasis added) (citations omitted). Plaintiff claims that "[a]lthough the least restrictive classroom option on the Beaty campus was recommended, this 'integrated' placement provided R.H. with greatly reduced exposure to his non-disabled peers compared to his regular education setting at TLC." Dkt. 38 at 4. Plaintiff cites to evidence in the record that the enrollment of students at Beaty fluctuated, such that, during some periods, only half of the students in any given class might be non-disabled. Plaintiff claims that TLC, on the other hand, had a significantly smaller percentage of disabled children in R.H.'s class.

However, the fact (or possibility as it appears in this case) that R.H. may have been in a classroom with a greater percentage of non-disabled peers at TLC does not mean that the Beaty classroom environment is not considered an LRE. Importantly, the Fifth Circuit has stated that "even when school officials can mainstream the child, they need no provide for an exclusively mainstreamed environment; the Act requires school officials to mainstream each child only to the maximum extent appropriate." *Daniel R.R.*, 874 F. 2d at 1045. Here, R.H. was placed in an integrated environment at Beaty where he was in a classroom with both disabled and non-disabled peers. Plaintiff has not shown that this integrated classroom – merely because it contained more disabled children than his at TLC – failed to provide him with a FAPE, and there is no magic number of

non-disabled peers a classroom must have in order to satisfy the IDEA. The Court agrees that the integrated classroom offered at Beaty was mainstreamed to the maximum extent appropriate.

The Court next addresses Plaintiff's allegation that PISD's failed to consider TLC as a possible LRE for R.H., including the District's purported failure to consider whether placement at TLC with supplemental aids would have been more appropriate. Plaintiff relies on some testimony by Beaty's principal that she did not consider TLC when determining the LRE for R.H. The Court need not reach what the record shows about whether TLC was considered by the District in order to find that the District provided him with a FAPE in the LRE. Even though a private school might be more appropriate or better able to serve a child, courts have found that school districts are not required to consider private placement as long as an appropriate public school program is available. *See, e.g., Michael F.*, 931 F. Supp. at 479. As correctly noted by one court,:

> [T]he proposition that a school district is required, as part of its assessment of how best to provide for a child's education, to canvass private schools for possible placements if so requested by the parents....is a faulty reading of IDEA. The law requires the district to evaluate the child's needs and to determine what is necessary to afford the child a FAPE. If it appears that the district is not in a position to provide those services in the public school setting, then (and only then) must it

> place the child (at public expense) in a private school that can provide those services. But if the district can supply the needed services, then the public school is the preferred venue for educating the child. Nothing in IDEA compels the school district to look for private school options if [the District], having identified the services needed by the child, concludes that those services can be provided in the public school.

W.S. ex rel. C.S. v. Rye City School Dist., 454 F. Supp.2d 134, 148 (S.D. N.Y. 2006).

It seems that Plaintiff's argument is premised on the assumption that TLC is a "regular" classroom and Beaty is not. The Court finds that the neither the record nor applicable case law make such a bright line distinction. The classrooms in both schools had both disabled and non-disabled children in them – though the ratio of disabled to non-disabled may have differed. The Court finds that, however way Beaty is characterized, the District's plan provided R.H. with supplemental aids and services — one of which may have well indeed been the placement of R.H. in a classroom with both disabled and non-disabled peers where he could both model appropriate behaviors and receive the extra services, attention, and therapies from trained care providers his disability merited — in the least restrictive manner. As recognized by the court in *Daniel R.R.*, a variety of factors determine whether a District has appropriately mainstreamed a child with disabilities. *Daniel R.R.*, 874 F.2d at 1048. The Court finds that

the placement at Beaty constituted a program administered in the least restrictive environment as required by the IDEA and the cases interpreting it.

Having examined this case under all four of the *Michael F.* factors, the Court, therefore concludes by a preponderance of the evidence that the record indicates that PISD's IEP for R.H. was reasonably calculated to enable him to receive meaningful educational benefits and thus provided him with a FAPE in accordance with IDEA. As noted above, because the Court has concluded that PISD did not violate IDEA in this case, the Court need not reach whether TLC was an appropriate private school placement.

Because the Court agrees that PISD complied with IDEA, Plaintiff is not entitled to reimbursement for the costs of TLC during the 2005-2006 school years. Although 20 U.S.C. § 1415(e)(3)(A) provides that "during the pendency of any proceedings conducted pursuant to this section, ... the child shall remain in the then current educational placement of such child," "parents who unilaterally change their child's placement during the pendency of review proceedings, without the consent of state or local school officials, do so at their own financial risk. If the courts ultimately determine that the IEP proposed by the school officials was appropriate, the parents would be barred from obtaining reimbursement for any interim period in which their child's placement violated § 1415(e)(3)" *School Committee v. Department of Educ.*, 471 U.S. 359, 373-74, 105 S.Ct. 1996, 85 L. Ed.2d 385 (1985). Because PISD did not consent to R.H.'s transfer to

private school, his parents are not entitled to reimbursement for the cost of TLC for the 2005-2006 school year. *Houston Independent School Dist. v. Bobby R.*, 200 F.3d 341, 350 (5th Cir. 2000).

Notice Requirement for Summer 2005

In his complaint, Plaintiff alleges that the Special Hearing Officer erred as a matter of law by applying the IDEA notice requirement to bar reimbursement to Plaintiff for summer 2005. Plaintiff argues that the notice requirement applies only to a case in which a parent specifically refuses placement and that no placement was offered for Summer 2005 in this case. 20 U.S.C. § 1412(a)(10)(C)(iii).

As noted above, the Special Hearing Officer concluded that the District failed to provide R.H. with a FAPE for the Summer of 2005 because it failed to consider providing him with ESY during that period. It is undisputed that R.H.'s parents enrolled him in TLC for that period. When parents enroll their children in private schools without the consent of the school district, "a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment." 20 U.S.C. § 1412(a)(10)(c)(ii).

Here, the Special Hearing Officer determined reimbursement was not warranted because Plaintiff did not comply with the notice requirements outlined in 20 U.S.C. § 1412(a)(10)(c)(iii) (A.R. at 14). Plaintiff

argues that these notice provisions did not apply to the denial of the 2005 summer session because no ARD meeting was ever conducted to specifically consider this session. However, Plaintiff does not cite any to legal authority or portions of the record to support his apparent argument that the denial of the 2005 summer session was not encompassed by the other ARD meetings and therefore not subject to the notice requirements. Therefore, the Court declines to find that the Special Hearing Officer erred in her findings regarding the notice requirements. In any event, the Court notes that regardless of the notice requirement, the reimbursement of costs under this section of the IDEA is within the Special Hearing Officer's discretion. 20 U.S.C. § 1412(a)(10)(c)(ii). The Court declines to find that the Special Hearing Officer abused her discretion in finding Plaintiff was not entitled to reimbursement here.

Attorney's Fees

Plaintiff seeks an award of attorney's fees here. Under the IDEA, a court may, in its discretion award attorney's fees to a parent of a child with a disability if that parent is found to be the prevailing party. 20 U.S.C. § 1415(i)(3)(B)(i)(I). The Court declines to find that such an award of attorney's fees is justified here because Plaintiff has not prevailed.

Costs

Finally, PISD seeks to recover its taxable costs of court under *Michael F.*, 118 F.3d at 256- 57. The Court declines to award costs to PISD under *Michael F.* While the Fifth Circuit did not expressly

disapprove of the district court's award of costs in that case, the court suggests that such an award was within the district court's discretion. Indeed, costs are recoverable under Rule 54 unless a "court order provides otherwise." FED .R. CIV. P. 54(d) The taxing of costs under 20 U.S.C. § 1920 is likewise discretionary. Further, the *Michael F.* court stated it did not disagree with the parents' equity-based arguments in opposing an award of costs. *Michael F.*, 118 F.3d at 257. Plaintiff makes similar arguments here.

The Court agrees with Plaintiff that the spirit, if not the express language, of the IDEA does not contemplate such an award of costs in favor of a prevailing school district. And, based on these facts, the Court declines to award the school district its costs.

Although the Court ultimately found in favor of the school district, R.H.'s parents here were well within their rights under the IDEA and their obligations as parents to ensure that their son is afforded all the opportunities available to him. R.H.'s parents were only seeking the best for their son. The Court finds that, absent clear authority mandating them to do so, they should not be required to take on additional financial burdens solely because they sought adjudication of this matter.

Recommendation

Based on the foregoing, the Court recommends that Defendant's Motion for Summary Judgment on the Administrative Record (Dkt. 15) be GRANTED, that

Plaintiff's Motion for Summary Judgment on the Administrative Record (Dkt. 38) be DENIED, that the findings of the Special Education Hearing Officer for the State of Texas in this matter be affirmed, and that each party should be ordered to bear its own costs and fees.

Within ten (10) days after service of the magistrate judge's report, any party may serve and file written objections to the findings and recommendations of the magistrate judge. 28 U.S.C.A. § 636(b)(1)(c).

Failure to file written objections to the proposed findings and recommendations contained in this report within ten days after service shall bar an aggrieved party from *de novo* review by the district court of the proposed findings and recommendations and from appellate review of factual findings accepted or adopted by the district court except on grounds of plain error or manifest injustice. *Thomas v. Arn*, 474 U.S. 140, 148 (1985); *Rodriguez v. Bowen*, 857 F.2d 275, 276-77 (5th Cir. 1988).

SIGNED this 7th day of March, 2008.

/s/ Don. D. Bush
Don D. Bush
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

R.H., BY HIS PARENTS AND NEXT FRIENDS, EMILY AND MATTHEW H.	§	
Plaintiff,	§	CASE NO. 4:06cv352
v.	§	
PLANO INDEPENDENT SCHOOL DISTRICT	§	
Defendant.	§	

FINAL JUDGMENT

Pursuant to the Memorandum Adopting Report and Recommendation of United States Magistrate Judge filed in this matter, it is hereby

CONSIDERED, ORDERED, AND ADJUDGED that the final decision of the Special Education Hearing Officer is hereby **AFFIRMED** and judgment is **GRANTED** in favor of Defendant.

Each party shall bear its own costs, and all motions by either party not previously ruled on are hereby **DENIED**.

SIGNED this the 31st day of March, 2008.

/s/ Richard A. Schell

Richard A. Schell
United States District Judge

§105(b), to permanently comply with the requirements of the Fed Contract. That the federal interest created by the Fed Contract is permanent comes simply and directly from Title I and the contract itself – nothing in Title I or the Fed Contract indicates or could give rise to a termination point. This is entirely sensible because a Title I grant is a large one-time upfront payment, similar to an endowment, made to enable the development and permanent operation of a Title I community on a basis well less than its market potential. The original benefit enabled by the grant, a vastly subsidized purchase of real estate, a permanent asset, accordingly lasts permanently and so it is logical and straightforward that the accompanying obligation is also permanent.

The mechanism embodied in Title I guarantees that the benefits and obligations of the Title I grant remain permanently available and in force. The benefits are permanently available because any sale of a Title I redevelopment must be at its subsidized 'fair value' price. The obligations of the Title I grant remain permanently in force because the redevelopment may only be operated according to the purposes specified in the HHFA-approved Fed Plan.

As there is a federal interest in the continuing compliance with the requirements of the PWV Title I grant, it is appropriate to bring this suit in a federal court.

II. CORRECTION TO RESPONDENTS' BRIEF

Respondents' statement: "Petitioner's entire theory as to why he is a third party beneficiary with standing to enforce the Federal Contract relies on the doctrine of *expressio unius est exclusio alterius*," (OppBr. p.8) is false. The theory why petitioner is a 3PB of the Federal Contract and therefore has standing to enforce his (and his fellow tenants') rights under this contract, is fully explained on pages 8-12 of the petition, and has nothing to do with *expressio unius est exclusio alterius*. Petitioner does employ *expressio unius est exclusio alterius* to support an entirely different claim, that the drafters of the Title I master contract intended residents of Title I communities to have a right to sue (Petition Pt. IA, p. 13).

III. CORT V ASH ANALYSIS

In addition to the 3PB, Fed Contract and §106(c)(7) grounds to sue, petitioner would also have a right to sue utilizing the Cort v Ash test. *Cort v Ash*, 422 U.S. 66, 78. (a) Intended beneficiaries: Tenants of Title I communities are the intended beneficiaries of Title I. The purpose of the grant making provision in Title I is to create spaciously laid out and affordable urban housing (see full explanation, Petition p.8-12). Tenants of Title I housing are the inevitable, sole and intended beneficiaries of "spaciously laid out and affordable." (b) Provision for remedy: As beneficiaries generally and under §106(c)(7), when 'speculation in land holding' harms their interests, tenants may sue to

obtain remedy. (c) Advance the purpose: The predominant purpose of Title I is to create, permanently, spaciously laid out and affordable housing[2] (see Petition, p.5-6). (d) No relevant state law: Title I housing exists as both housing and as Title I housing. A generic housing issue, such as lack of heat in the winter, is likely a state law matter. Clearly however, where the controversy involves a failure to comply with §§103(a) and 105(b) of Title I, as is the case here, the controversy is a unique federal law controversy, and not only does federal law apply, but there is no state law that is relevant.

IV. THE RESTRICTIONS AND OBLIGATIONS IN THE FED CONTRACT REMAIN IN FORCE

A. The redeveloper subcontract must conform to the controlling Fed Contract

Respondents claim after 40 years the original restrictions on the operation of PWV expire. This contention was rejected by the lower courts, and respondents did not appeal the rejection of their 40-

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[2] Title I became law and was funded by Congress to create PWV-like urban renewal communities. However, where residential housing would not be appropriate (for instance, a slum surrounded by highways), Title I allows alternative uses. Nonetheless, as the plethora of quotes from SR 84 demonstrate (see Point IV.B), the intention and only reason Congress enacted Title I was, to paraphrase the old real estate joke, housing, housing, housing.

year claim. Furthermore, respondents are either confused themselves or attempting to confuse this Court.

Respondents' statement: "[T]he city created and adopted a plan ...that was approved by the federal agency administering Title I. The plan provided...a private redeveloper...would be legally obligated...to build the project in accordance with the plan, and then maintain the project...for at least 40 years," (OppBr p.2) is false. This statement is false because there are two plans and this statement attempts to portray the two plans, one controlling and mandatory, the other subsidiary and required to be materially the same as the controlling plan, as one and the same.

The HHFA-approved Fed Plan part of the controlling Fed Contract establishes the requirements of the Title I redevelopment, while, as required by §105(b), the subsidiary redeveloper contract and plan must conform in all material respects to the Fed Contract and Fed Plan.

Section 105(b) states that the obligations the LPA assumed under §103(a) when accepting the Title I grant, are obligatory on the redeveloper. This obligation is restated in, and made part of, both the Fed Contract and the subsidiary M-Contract.

Since the Fed Contract (including the HHFA-approved Fed Plan) has no expiration date, event, or circumstance that may be construed to create an expiration date, the subsidiary M-Contract

(including its incorporated redevelopment plan), may not have an expiration date either and any clause indicating an expiration date is legally unenforceable.

B. Title I and its legislative history establish that Title I grants have no expiration

The district court, although not accepting the alleged 40-year expiration point in the M-Contract, nonetheless rejected the idea that the restrictions and requirements of the Fed Contract and Title I are applicable today. The district court stated:

> "The Housing Act makes no mention of future residents of a completed housing project." (Pet. p.18a)

As explained at length in pages 8-12 of the petition, there could not be a Title I grant for such housing unless, and only unless, the grant was for the purpose of benefiting the future residents of that housing in the form of lower density housing and (maximally) affordable rents.

The District Court continued:

> "The legislative history shows that the housing act was designed to address post war economic conditions.... Congress clearly did not intend to remedy congestion in a successfully revitalized area some fifty years in the future."

The legislative history speaks for itself[3]:

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[3] Selection of statements in SR 84 indicating Congress perceived inadequate housing as a deep-rooted and long-standing problem and intended to create a permanent, final and ultimate solution to this problem.

> "[I]t provides the authorization of Federal financial assistance for a long-delayed but vitally needed start on the clearance of slums and blighted areas for redevelopment." (SR 84 at 1552).
>
> "[a] sound foundation for the comprehensive action which is needed in order to make a real attack on the Nation's housing problem." (Id at 1552).
>
> "Up to the present time, we have never been able to approach the objective of an adequate supply of decent housing." (Report of the Subcommittee on Housing and Urban Redevelopment of the Special Committee on Postwar Economic Policy and Planning, p.3. This report, dated August 1, 1945, (before the end of WW2), is referred in SR 84 at 1553, and serves as the basis for the National Housing Policy established in the 1949 Act).
>
> "[T]he housing problem is one of great magnitude and long-standing." (SR 84 at 1555).
>
> "Your committee believes that the establishment by the Congress of a national housing policy which will define our housing objectives is long overdue..." (Id. at 1558).
>
> "Throughout this period of 17 years [since Congress first addressed housing needs in 1932] there has never been a statement by the Congress of our national housing objectives..." (Id. at 1558).
>
> "The need for such a policy declaration is increased by the housing programs authorized by this bill, and which

The numerous quotations from SR 84 establish beyond question Congress enacted the Housing Act to remedy the long-standing, widespread, deeply-rooted and highly alarming problem of a generations-long insufficiency of decent housing, particularly within the nation's cities, that without

---

> are clearly essential if the nation is to make real progress in overcoming its deeply rooted housing problems." (Id. at 1558).
>
> "The declaration states first, that the general welfare and security of the Nation requires the realization as soon as feasible of the goal of a decent home and suitable living environment for every American family." (Id. at 1559).
>
> "The persistence of widespread slums and blighted areas..." (Id. at 1560).
>
> "These slums and blighted areas have existed and have grown for generations." (Id. at 1560).

In so many words the Committee states a core objective of Title I:

> "[I]f the land is to be rebuilt at appropriate densities and in accordance with sound redevelopment plans which will prevent the recurrence of slum conditions." (Id. at 1560).
>
> "[T]he primary purpose of federal aid in this field is to help remove the impact of slums on human lives rather than to simply assist in the redevelopment or rebuilding of cities." (Id. at 1560).
>
> "[F]irm and reasonable expectation for the ultimate solution of a condition which has borne heavily on them for decades." (Id. at 1565).

substantial federal intervention, would never end. Additionally, direct and conclusive evidence shows the Housing Act was not enacted in response to postwar economic conditions, as the district court claims, but that it was enacted in spite of the robust, almost inflationary, volume of private building already occurring, outside of urban cores, without any legislation. Senator Ellender, the Act's third co-sponsor stated: "Now I admit this; that we would have been in a very tight pinch last year to do much building without encroaching on private business....I am satisfied that the scarcity of lumber and building materials is not going to be so acute in the future." (General Housing Legislation, Hearings, before a Subcommittee of the Committee on Banking and Currency, United States Senate, February 3, 1949, p.61). George Fuller of the National Lumber Manufacturers Association, testified that "[d]espite a continuation of rent control, American industry has provided more new housing than in any period in its history." (Id. p.759).

The district court's claim Congress didn't intend to remedy congestion fifty years in the future (Pet. p.19a) is difficult to understand. When this suit was commenced the open spaces required by the Fed Contract and Title I were still there. There was no congestion to remedy.

The district court does not address the plain, clear text of Title I which, as explained above regarding the permanent federal interest, both establishes a mechanism for the permanent

continuation of the Title I grant restrictions and has nothing within it to state, suggest, indicate or infer that the Title I and grant contract restrictions ever expire.

V. THIS CASE RAISES COMPELLING PUBLIC INTEREST ISSUES AND THEREFORE SHOULD BE HEARD

Respondents attempt to convince this Court that this case is not worthy of its attention. This case is not at heart a dispute between private actors. It does not involve deciding between the interests of one commercial entity or another. This case concerns the preservation of the public-purpose mandate established by the disbursement of public monies. Not only does this case apply to numerous Title I communities across the country, but it raises an even broader question: What protects the public-purpose interest in public subsidy or grant laws?

This Court often decides cases where there are differences of opinion amongst different circuits. Here however the Court is being asked to address a more fundamental issue of appellate justice. The decisions of the lower courts in this case are simply wrong. Strong support for this contention is clearly established by the inability and failure of respondents to rebut the claims presented to this Court in the petition. The presence or absence of other circuits addressing the issues in this case do not make the lower court decisions in this case any less incorrect. An incorrect decision is an incorrect decision, and the deleterious effects of these

incorrect decisions will be suffered by the PWV community and over time, many others, unless this Court acts to overturn the decisions of the lower courts.

Should this Court decline to hear this case, then the Title I grant will have been successfully stolen. Furthermore, a noxious and dangerous principle will be established, that after the shouting and hurrahs have died down, private interests participating in publicly funded programs, are free to expropriate, pervert or simply steal the publicly funded assets entrusted to them.

CONCLUSION

The petition should be granted.

Respectfully submitted,

Michael Chenkin
Pro Se
788 Columbus Avenue
New York, NY 10025
212 866-1726
michaelchenkin@earthlink.net

November 15, 2010

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